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No. 90-248

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1990

SAN FRANCISCO FIRE FIGHTERS LOCAL 798,
INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, AFL-CIO,
*Petitioner,*

VS.

CITY AND COUNTY OF SAN FRANCISCO,
FONTAINE DAVIS, *et al.*,
UNITED STATES OF AMERICA,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

LOUISE H. RENNE
City Attorney
(Counsel of Record)
GEORGE A. RILEY
CHRISTINA HALL
Deputy City Attorneys
400 Van Ness Avenue
Room 206
San Francisco, CA 94104
(415) 554-6221
*Attorneys for Respondent*
*CITY AND COUNTY OF*
*SAN FRANCISCO*

BONNIE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

Respondent City and County of San Francisco ("City") respectfully requests that this Court deny the Petition for Writ of Certiorari filed by petitioner San Francisco Fire Fighters Local 798, International Association of Fire Fighters, AFL-CIO ("Local 798").

## STATEMENT OF THE CASE

After protracted litigation, the City and County of San Francisco entered into a consent decree to resolve two decades of successful state and federal challenges to the hiring and promotional practices of its Fire Department. This history is marked by findings that the Department had repeatedly used selection procedures in violation of civil rights laws and court orders. Faced with unassailable evidence of discrimination in the most recent examinations and the prospect of a trial raising numerous claims of racial hostility and harassment throughout the Department, the City agreed to a comprehensive settlement to eradicate the effects of longstanding practices and avoid the imposition of more drastic relief.

The evidence which induced the City to settle the action justified and informed the Decree's narrowly tailored affirmative relief. Petitioner's statement of the case, however, does not fully or accurately recount these facts.

### Background

Twenty years ago, the NAACP and two other organizations filed a lawsuit challenging the Fire Department's 1968 entrance examination. In *Western Addition Community Org. [WACO] v. Alioto*, 330 F.Supp. 536 (N.D. Cal. 1971), the District Court held that the plaintiffs had established a *prima facie* case of unlawful discrimination. The examination had severe adverse impact toward minorities, and the City conceded that the test was not reasonably connected to the job's requirements.

In 1971, the City administered a modified entrance examination. Again, the results showed adverse impact toward minorities. The District Court found that the City had not performed the basic analysis necessary to justify the examination and enjoined the Department from using the results. *Western Addition Community Org. [WACO] v. Alioto*, 340 F.Supp. 1351 (N.D. Cal. 1972).

The City submitted a third entrance examination for review in January 1973. The District Court found that the City failed to validate the examination in accordance with federal guidelines.

The Court admonished the City "to seriously, rather than superficially and speciously, face up to the problem presented to it." *Western Addition Community Org. [WACO] v. Alioto*, 360 F.Supp. 733, 739 (N.D. Cal. 1973). The Court issued an order limiting the use of the written test and directing the City to conduct empirical validation of its selection procedures. *Id.* at 740.

In November 1973, the District Court found that the City had failed to carry out the order issued earlier that year. *Western Addition Community Org. [WACO] v. Alioto*, 369 F.Supp. 77 (N.D. Cal. 1973), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir.) (*per curiam*), *cert. denied*, 423 U.S. 1014 (1975). Noting the City's "dilatoriness . . . and apparent stubborn insistence upon arguments and alternatives which this court has repeatedly found unacceptable," the District Court granted affirmative relief. 369 F.Supp. at 80. The Court ordered the City to hire one minority for every non-minority hired until the list of qualified minorities was exhausted.

The specific challenges to entry-level hiring raised by the WACO plaintiffs were resolved by a consent decree in May 1977. *See United States v. City and County of San Francisco*, 696 F.Supp. 1287, 1292 (N.D.Cal. 1987), *aff'd as modified, Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989) (Petitioner's Appendices [Pet.App.] p.37a). The entry examination administered pursuant to this decree produced adverse impact, but the District Court upheld the results because the City had complied with the express terms of the settlement. 696 F.Supp. at 1293 (Pet.App. p.39a). The WACO decree expired in 1982. *Id.*

The WACO litigation concerned only discrimination against minority males in entry-level hiring. The first challenge to promotional practices in the Fire Department occurred in 1980. Black firefighters filed complaints with the California Fair Employment and Housing Commission (FEHC) alleging that the 1978 lieutenant examination discriminated on the basis of race. (Lieutenant is the first promotive rank in the Fire Department, and all entry level firefighters who have completed one year in service are eligible to take the examination.) In a challenge under Califor-

nia's Fair Employment and Housing Act (Cal. Gov. Code §§ 12900 *et seq.*), the California Court of Appeal held that the examination had adverse impact toward Blacks. *City and County of San Francisco v. Fair Employment and Housing Comm'n*, 191 Cal.App.3d 976, 989 (1987). Applying the standards developed for Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) to the state anti-discrimination statute, the appeals court held that the City had not justified the examination as a valid, job-related selection device. *Id.* at 991.

Because the City had made appointments from the 1978 exam results, the FEHC ordered the immediate promotion with back pay of four Black firefighters. The FEHC also ordered the City to promote six other Black firefighters to the position of lieutenant within one year and appoint one Black for every five non-minorities until valid selection procedures for the rank of lieutenant had been established. *Id.* at 982. The California Court of Appeal, however, refrained from ordering such relief pending the outcome of the current federal litigation.

> The federal court has signaled its intention to assure the expeditious development of valid entry-level and promotional examinations, to preclude the reinstitution of previous discriminatory employment practices, and to ensure that lawful employment procedures are instituted in the future. We have confidence that the federal court is in the best position to order broad prospective relief. Therefore, the imposition of accelerated promotional goals or other action to eradicate the effects of past discrimination should be left to the federal forum.

*Id.* at 993. In approving the consent decree, the District Court held that the Court of Appeal's decision had preclusive effect. 696 F.Supp. at 1294 (Pet.App. p.41a).

**Current Litigation**

Following the expiration of the WACO consent decree, the Fire Department administered new entry-level hiring procedures in 1982. The Department gave a new test for lieutenant in 1984, while the FEHC litigation over the 1978 lieutenant examination

continued in state court. After the City published the results of the 1982 entry examination, the United States brought an action against the City alleging that the test had an adverse impact on Blacks, Asians and Hispanics. Plaintiff-intervenors, comprising various individuals and organizations, brought a separate action alleging that the hiring and promotional procedures discriminated against minorities and women. (Women, who were not included in the WACO litigation, were prohibited from employment in the Fire Department until 1976.) Plaintiff-intervenors also sought monetary and injunctive relief to redress historic patterns and practices of racial discrimination at all levels in the Department. The two cases were consolidated in 1986.[1]

In February 1986, the Court enjoined the City from proceeding with its plans to immediately hire entry-level firefighters based on the results of the 1982 examination.[2] In June 1986, the Court granted partial summary judgment finding that the 1982 entry-level hiring procedures had an adverse impact on Blacks and women. Following intensive discovery, the parties filed a joint pretrial statement declaring as undisputed the adverse impact of

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[1] Petitioner states that a proposed consent decree between the City and the United States was withdrawn because of opposition from the City's Board of Supervisors. Petitioner implies that some members of the Board exerted political pressure in favor of preferences for minorities. Nothing in the record will bear out this suggestion. A settlement with the United States would not have resolved the claims alleging discrimination toward women in hiring and toward minorities in promotions. Nor would such a settlement resolve plaintiff-intervenors' claims of pervasive, egregious discrimination within the Department. A comprehensive settlement of all claims represented the best use of the City's resources.

[2] Petitioner suggests that the City never intended to use the results of the examinations in question, suggesting a conspiracy with plaintiff-intervenors. Pet. pp.3-4. This is contrary to the facts. As the District Court noted: "In the case of the 1982 H2 appointment list, the City's intent to imminently consummate its concededly discriminatory employment procedure was thwarted only by order of this court preliminarily enjoining the use of the test for any hiring purpose." *United States v. City and County of San Francisco*, 656 F.Supp. 276, 287 (N.D. 1987).

the 1982 entry-level selection procedures on Hispanics, Asians and women. The parties also agreed that the 1984 lieutenant examination had an adverse impact on minorities.

After what the District Court termed "two years of tenacious and uncompromising pretrial litigation in defense of the challenged examinations," the City conceded that it could not defend the examinations' validity. *United States v. City and County of San Francisco*, 656 F.Supp. 276, 281 (N.D. Cal. 1987) (Pet.App. p. 113a). On February 26, 1987, the District Court granted partial summary judgment, holding that the clear adverse impact of the unvalidated examinations constituted a violation of Title VII. The District Court rejected the City's contention that withdrawal of the challenged examinations would moot any claim for injunctive relief.

> [T]he City has only deepened cause for concern by conceding that it has failed once again to develop valid employment procedures for hiring and promotions within the Fire Department, thus adding yet another chapter to an unenviable record of behavior reaching back nearly two decades. For the court to ignore the [Fire Department's] consistent and ongoing inability to utilize nondiscriminatory employment procedures, and to decline to enter judgment and award injunctive relief to assure that this sorry history will finally come to an end, would be inexcusable.

*Id.* at 287 (Pet.App. p. 125a). In the order (hereinafter "the 1987 order"), the Court enjoined the City from using any selection procedure for hiring or promotion that produced adverse impact unless the procedure could be validated in accordance with federal guidelines. The Court further enjoined the City to conduct an aggressive recruitment campaign for minorities and women, and to cooperate with all parties in the development of valid examinations. To avert a firefighting crisis, the Court permitted the City to make interim appointments from the results of the entry-level examinations. The City was directed to make these provisional appointments to reflect the minority and female proportions of the applicant pool. *Id.* at 289-293 (Pet.App. pp. 131a-139a).

The 1987 order was limited in two important respects. First, the District Court refrained from ordering relief with regard to promotions pending the outcome of the FEHC proceedings over the 1978 lieutenant examination. Second, the Court postponed until trial the question of affirmative relief to remedy the effects of past discrimination.

> This determination must be left to trial, when the court will have before it the full range of relevant evidence regarding the [Fire Department's] satisfaction of the WACO consent decree's objectives. [footnote omitted] In light of this resolution, the court need not reach the subsequent question of whether the administration and cancellation of the examinations impermissibly perpetuated the effects of prior discrimination in a manner violative of Title VII. The court observes, though, that this determination is also more appropriately left to trial, when the court can consider the [entry-level and promotional] examination procedures in the broader context of plaintiff-intervenors' pattern and practice allegations.

*Id.* at 286 (Pet.App. p. 123a).

**The Consent Decree**

The 1987 order left for trial the plaintiff-intervenors' allegations that the Department had tolerated a pervasive, racially hostile environment. A trial featuring considerable evidence in support of these claims would have had a devastating effect on firefighters' morale and public confidence in the Department. The City was also aware that the Court could order sweeping remedial actions if the plaintiff-intervenors prevailed. Therefore, the City elected to resolve the action through a comprehensive settlement.

The consent decree reflects the manifold challenges to the employment practices and work environment of the Fire Department. The decree requires training in human relations and mediation to prevent racial harassment. The decree also establishes a new mechanism for investigating and punishing persons who perpetuate racial harassment. The decree incorporates the provisions of the 1987 order requiring the development of valid entry-level and promotional examinations. The decree requires the administration of these examinations on a schedule designed to

ensure rapid employment and promotional opportunities for both minorities and non-minorities. 696 F.Supp. at 1313-1318 (Pet.App. pp. 82a-94a).

The consent decree specifies hiring goals "in order to eradicate the present effects of past employment practices with respect to minorities and women." *Id.* at 1313 (Pet.App. p. 82a). The nature of these goals is clearly defined. "The hiring and promotional objectives set forth herein are goals rather than quotas. Nothing herein should be interpreted to require the hiring and promotion of unqualified persons." *Id.* The City agreed to hire five hundred firefighters during the life of the decree. The consent decree repeats the goal of the WACO decree to raise minority representation to forty percent to reflect the percentage of minorities in the City's applicable labor pool. The decree also projects as an objective that women will make up ten percent of the firefighting force at the conclusion of the consent decree. For each entrance examination, the overall hiring goals for women and minorities are ten and fifty-five percent, respectively. *Id.* at 1314 (Pet.App. p. 84a). The flexible nature of these targets is underscored by a provision that permits the City to justify any departures by showing that a failure to meet a goal was a result of a lawful selection procedure. *Id.*

To remedy the effects of discrimination in past promotional procedures, the consent decree mandates that six Black firefighters who had successfully challenged the 1978 lieutenant examination would be retroactively promoted. Because these individuals were deprived of the opportunity to compete in the 1984 examination for the next promotive rank of captain, they would receive a "make-up" examination. The decree directs the City to integrate the results of this examination with the results of the 1984 captain examination. *Id.*

The promotion of the six Black firefighters to the rank of lieutenant did not, however, resolve the pending challenges to the 1984 lieutenant examination. Because of a chronic shortage of lieutenants and the possibility that the Court would order drastic affirmative action after a finding of deliberate discrimination, the City agreed to promote twenty-seven minority firefighters immediately from the results of the 1984 lieutenant examination. The

City also had the option to appoint forty-eight additional lieutenants; twenty-five percent of these promotions were targeted for minorities. *Id.* at 1316 (Pet.App. p. 89a).

**Court Approval**

The District Court applied two standards in analyzing the decree. First, the Court determined whether, pursuant to Fed. R. Civ. Pro. 23(e), the settlement of the class action was "fundamentally fair, adequate and reasonable." *Id.* at 1300 (Pet.App. p. 55a). The Court considered "objections filed by individual firefighters and members of the public." *Id.* at 1305 (Pet. App. p. 65a). Local 798's challenges were treated separately in the Court's analysis of the decree's implications for Title VII and equal protection. *Id.* Many objections to the decree's fairness focused on the promotion of minority firefighters from the results of the 1984 examination. The Court specifically modified the decree to ensure that only qualified firefighters would receive the promotions. "Race will be only one consideration among others, including each candidate's work history and performance evaluations." *Id.* at 1306 (Pet.App. pp. 67a-68a). With this change, the Court found that the decree was a fair settlement of the class action.

The Court next turned to the constitutional and statutory challenges to the decree's race-conscious remedies. The Court applied the most stringent analysis required of affirmative action programs: Whether the decree was narrowly tailored to remedy a pattern and practice of discrimination in hiring and promotion on the basis of race and sex. *Id.* at 1301 (Pet.App. p. 57a). The Court found a firm basis in the evidence to justify affirmative action. The undisputed evidence supported a *prima facie* case of discrimination in violation of Title VII. The Court held that merely enjoining the City to comply with the law would be inadequate in light of the City's repeated failures to implement lawful hiring and promotion procedures and the "significant evidence regarding racial harassment." *Id.* at 1307-08 (Pet.App. p. 70a). "Affirmative race-conscious relief is the only effective means to assure the enjoyment of equal opportunity and to prevent further delays by the City." *Id.* The Court held that the

decree's remedies were narrowly tailored to accomplish the purposes of eradicating the past and present effects of the City's discriminatory employment practices. *Id.* at 1309 (Pet.App. p. 73a).

On appeal, the Ninth Circuit performed a two-part review of the District Court's decision. First, the Court of Appeals held that the District Court had not abused its discretion by finding that the consent decree was a fair settlement of a class action pursuant to Rule 23(e). The Court held that the trial court had properly weighed various considerations including the City's risk of being found liable for intentional discrimination. *Davis v. City and County of San Francisco,* 890 F.2d at 1445 (Pet.App. 10a-11a). Second, the Court of Appeals upheld the decree against Local 798's specific challenges under Title VII and equal protection. With respect to these questions, the Court of Appeals applied the same exacting analysis required of any court reviewing race-conscious remedies: Are the provisions strictly tailored to remedy the government employer's past discrimination, the evidence of which must be clearly and specifically set forth. *Id.* at 1445-1446 (Pet.App. p. 12a). On the basis of this standard, the Court of Appeals affirmed the District Court's decision but limited the decree's duration from seven years "to seven years or sooner upon the accomplishment of the objectives or the goals of the consent decree." *Id.* at 1448 (Pet.App. p. 16a).

## REASONS FOR DENYING THE WRIT

### I

### The Ninth Circuit Properly Applied The Standard Of Review For Approval Of Class Action Settlements As Well As The Strict Scrutiny Required By This Court For Affirmative Action Programs.

Petitioner argues that the Ninth Circuit failed to determine whether the consent decree satisfied the constitutional demands of strict scrutiny. Petitioner maintains that the appeals court limited its review to the question of whether the trial court had abused its discretion by approving the decree. Such a relaxed standard, petitioner argues, is contrary to the stringent analyzsis

required by this Court for all forms of racial or gender classifications.

Petitioner's argument rests on a tortured reading of the Ninth Circuit's opinion. The Court of Appeals applied the abuse of discretion standard *only* to the issue of whether the District Court properly approved the settlement of a class action under Rule 23(e) of the Federal Rules of Civil Procedure. Finding no abuse of discretion, the Court then considered the separate issues of whether the decree violated the provisions of Title VII or the guarantee of equal protection. On these questions, the Ninth Circuit made an independent determination of whether the decree's affirmative relief could satisfy the exacting constitutional standards established by this Court.

### A. Because The Consent Decree Settled A Class Action, The Ninth Circuit First Reviewed The District Court's Decision For An Abuse Of Discretion.

Rule 23(e) requires trial court approval before settlement of a class action. The Ninth Circuit noted that this requirement is designed "to protect the interests of *class members* who may not have received due consideration by those negotiating the settlement." 890 F.2d at 1444, n.5 (Pet.App. pp. 9a-10a) (emphasis in original). The Court doubted whether Local 798, a union which was not a member of the plaintiff-intervenors' class, had standing to raise a fairness objection in addition to its separate challenges under Title VII and the Constitution. Without deciding this question, however, the Court of Appeals reviewed the union's objections to the decree's fairness as well as its statutory and constitutional claims. *Id.*

Under Rule 23(e), the trial court may approve a settlement that is "fundamentally fair, adequate and reasonable." *Id.* at 1444 (Pet.App. p. 9a). As this Court has held, a trial court's approval of a class action settlement is reviewed on appeal to determine whether the court abused its discretion. In *Evans v. Jeff D.*, 475 U.S. 717 (1986), for example, this Court held that a trial court did not abuse its discretion by approving a consent decree that required a waiver of attorneys' fees by counsel for the plaintiff's class. *See also System Federation No. 91 v. Wright*, 364 U.S. 642

(1961) (trial court abused its discretion by not modifying a consent decree). Therefore, the Court of Appeals properly considered whether the trial court had abused its discretion by approving the decree over general objections to its fairness. Satisfied that no abuse had occurred, the Ninth Circuit then turned to Local 798's specific challenges under Title VII and equal protection.

### B. On Appeal, Petitioner Invited The Ninth Circuit To Decide Whether The District Court Abused Its Discretion By Approving The Settlement.

Local 798 urged the Ninth Circuit to review the District Court's approval of the consent decree for an abuse of discretion.

> The District Court's approval of the Consent Decree pursuant to its orders dated 5/25/88 and 6/10/88 shall be reviewed on appeal herein under the "abuse of discretion" standard. *Berkman v. City of New York*, 705 F.2d 584 (2nd Cir. 1983).

Petitioner's Brief on Appeal at 25 (attached hereto as Respondent's Appendix [Resp.App.] p. 27a). Local 798, however, did not limit to Rule 23(e) its argument that the District Court had abused its discretion. Instead, the union argued throughout its brief that the Ninth Circuit should review the trial court's constitutional analysis for an abuse of discretion. Thus, Local 798 urged the appellate court to adopt the standard of review which the union now asserts was error. The Ninth Circuit, however, did not follow this approach. The Court clearly applied two different standards: First, the Court reviewed the trial court's approval of the settlement for an abuse of discretion. Satisfied that the District Court had not abused its discretion in applying the standards of Rule 23(e), the Ninth Circuit then conducted an independent consideration of whether the decree's remedial provisions "comport with the equal protection provisions of the fourteenth amendment and Title VII." 890 F.2d at 1445 (Pet.App. p. 11a).

### C. The Ninth Circuit Applied An Exacting Standard Of Review To The Affirmative Action Provisions Of The Decree.

This Court has not specified the precise formulation of the reviewing standard applied to government sponsored plans to eliminate the effects of past discrimination, nor has the Court determined whether the standard varies between court ordered remedies and voluntary plans. *Compare City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 720-721 (1989) (plurality opinion) (strict scrutiny required for voluntary plan) *with United States v. Paradise*, 480 U.S. 149, 166 (1987) (plurality opinion) (race-conscious remedies subjected to some "elevated level of scrutiny"). This Court has consistently held, however, that past discrimination by a government employer justifies the use of race-based remedies. "The Court is in agreement that, whatever the formulation employed, remedying past or present discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

This Court's decisions have clearly established the roles for trial and appellate courts considering objections to race-conscious remedies. The trial court must set forth the particular findings of fact that support the remedial actions. Without such findings, "an appellate court reviewing a challenge to remedial action by nonminority employees cannot determine whether the race-based action is justified as a remedy for prior discrimination." *Wygant*, 476 U.S. at 278. If such a factual predicate exists, the reviewing court must determine whether the challenged measure is tailored to remedy the effects of discrimination. Under strict scrutiny, the most stringent formulation of this analysis, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Id.* at 280.

This Court has always required an independent examination by an appellate court of the objectives and means of any system of race-based remedies. *See Paradise*, 480 U.S. at 167 (plurality opinion) (Court upholds race-conscious remedies after indepen-

dent review because the relief "survives even strict scrutiny analysis"). This determination presents strictly a legal question.

In the instant case, the Ninth Circuit performed its role in the manner required by this Court's decisions. The Court of Appeals first reviewed the record and found a "strong basis in evidence" sufficient to make out a *prima facie* case of past discrimination and to justify affirmative relief. 890 F.2d at 1446-47 (Pet.App. pp. 14a-15a). The Court then analyzed the decree's specific race-conscious remedial provisions to determine whether they were strictly limited to redress the effects of discrimination by the government employer. Using the factors set forth by this Court in *Paradise,* the Ninth Circuit examined the decree's remedial provisions. The independent nature of this review is demonstrated by the Ninth Circuit's decision to modify the duration of the remedial provisions so that they most closely match the goals of eradicating the clearly established effects of past discrimination. 890 F.2d at 1448 (Pet. App. p. 16a).

In summary, there is no merit to Local 798's first question presented for review. The Ninth Circuit performed an independent review of the decree's race-conscious remedies and applied the most exacting standard imposed by this Court for the approval of affirmative action programs.

## II

**The District Court Made The Proper Factual Determination Of A *Prima Facie* Case Of Employment Discrimination And Narrowly Tailored The Decree's Hiring Goals To Reflect The Actual Labor Market.**

As its second basis for the petition, Local 798 maintains that the Ninth Circuit erroneously found a *prima facie* case of employment discrimination by comparing the Fire Department's work force with the City's labor market. The union contends that the Court should have used the labor market of the larger metropolitan area to determine possible adverse impact.

The District Court's determination that the evidence supported a *prima facie* case of discrimination should not be disturbed.

First, Local 798 never presented to the Ninth Circuit a challenge to the undisputed evidence supporting the *prima facie* case of discrimination in hiring. Second, the union's argument rests on a clearly erroneous assumption. The trial court found a *prima facie* case of discrimination based on the adverse impact of the Department's hiring practices on the actual pool of qualified applicants for hiring or promotion. The Court never made a comparison between the results of the selection procedures and the general labor market to determine whether there was a *prima facie* case of employment discrimination. Third, the decree's hiring goals—not the Court's determination of adverse impact—do reflect the percentage of minorities in the City's population. This choice of the City's labor market is fully justified by evidence of twenty years of actual practice.

### A. Petitioner Failed To Raise The Question Of The Relevant Labor Market In Its Appeal To The Ninth Circuit.

In its appeal to the Ninth Circuit, Local 798 never intimated that the District Court had used the wrong labor market in its determination of adverse impact. To the contrary, the union accepted the trial court's findings that the evidence supported a *prima facie* case of employment discrimination. In the 1987 order, the District Court reviewed the undisputed facts that the 1982 hiring procedures had an adverse impact on minority and women applicants. The City could not defend the validity of the examinations. Thus, the District Court held that "these facts clearly establish a *prima facie* violation of the law." 656 F.Supp. at 282 (Pet.App. p. 115a). The union agreed with this analysis on appeal. Local 798 did not dispute that the City's examinations had adverse impact and that the City had failed to validate the tests. Rather, the union argued that this *prima facie* case of employment discrimination had been remedied by the 1987 order and did not require affirmative relief. Petitioner's Brief on Appeal at 27-32 (Resp.App. pp. 28a-34a).

Absent exceptional circumstances, this Court will not consider arguments that were not considered by the Court of Appeals. *Kosak v. United States*, 465 U.S. 848, 850 n. 3 (1984); *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 1662 (1988). This Court

should not grant the petition to review a factual determination which petitioner not only failed to raise but conceded on appeal.

### B. The District Court Employed A Precise Test For Adverse Impact By Measuring The Effects Of The Hiring Procedures On The Actual Pool of Qualified Applicants.

This Court has recognized that the adverse impact of entry level hiring procedures may be measured by comparing the racial composition of the employer's work force with the racial composition of a relevant labor market. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-339 (1977) ("Gross" disparities between the percentage of Blacks in the general population and the percentage in the work force deemed probative of a pattern and practice of discrimination). However, it is often more precise to compare the composition of the work force with the composition of the qualified applicant pool, a method repeatedly validated by this Court.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), this Court confirmed that one could establish a *prima facie* case of discrimination based on a substantial disparity in the selection rates of White and Black applicants. In *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), this Court held that a *prima facie* case could be supported by comparing the racial composition of the teaching staff and the racial composition of the qualified teacher population in the relevant labor market. The Court explicitly noted that applicant flow data had not been developed below, and the district court was admonished to determine whether such data could be developed on remand. *Id.* at 308, n. 13. Justice White's concurring opinion emphasized the primary significance of comparative statistics based upon the actual applicant pool, as opposed to comparative data based on the general labor market. *Id.* at 347-348. *In New York City Transit Auth. v. Beazer*, 440 U.S. 568, 585 (1979), the Court rejected an analysis based on general population data because it "[told] nothing about the class of otherwise qualified applicants and employees."

*Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115 (1989), cited by petitioner, does not undermine these principles. In that case, the Court confirmed that the underlying task is to present statistical evidence that is reliably probative of adverse impact; whether such evidence consists of comparative data based on the "pool of *qualified* job applicants" or the "*qualified* population in the labor force" may vary from one case to the next. *Id.* at 2122 (emphasis in original). The Court again confirmed the probative value of comparisons based on the population composition of the qualified applicant pool. *Id.* at 2123.

This Court has also recognized that because the actual value of particular statistics in individual cases is dependent upon a multitude of factors, it is proper to defer to the trial court's determination in this regard. *Hazelwood School Dist.*, 433 U.S. at 312. The Ninth Circuit as well as other courts, however, accord a preferred status to comparative statistics based on the composition of the applicant pool. *See, e.g., Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983) ("The best evidence of discriminatory impact is proof that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants."); *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (applicant flow data found to be most salient proof of the labor market in disparate treatment case); and *Hester v. Southern Ry.*, 497 F.2d 1374, 1379 (5th Cir. 1974) ("The most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of Blacks among those applying for a particular position and the percentage of Blacks among those hired for the position.").

The District Court in this case presented in some detail the statistics and other evidence upon which a finding of adverse impact rested. 696 F.Supp. at 1296 (Pet.App. pp. 45a-46a). With respect to the Department's entry-level hiring practices, the Court repeated the stipulated facts concerning comparative pass rates among actual entry-level applicants. The Court noted that summary judgment had been granted earlier on the claim that one portion of the entry-level examination resulted in adverse impact

toward Blacks and another portion resulted in adverse impact toward women. *Id.* The City subsequently declared that it would not defend the validity of the tests. Based on these admissions in conjunction with the findings on summary judgment, the District Court determined that there was a *prima facie* violation of Title VII under a theory of disparate impact. *Id.* at 1297 (Pet. App. p. 47a).

In reviewing the history of the litigation, the Ninth Circuit explicitly referred to the District Court's findings relating to passing rates and adverse impact. 890 F.2d at 1443-44 (Pet.App. pp. 7a-8a). The appeals court held that the District Court properly relied upon relevant statistics to determine whether there was sufficient evidence of discrimination. *Id.* at 1446-47 (Pet. App. pp. 14a-15a).[3] There is no basis in this Court's jurisprudence for reviewing the Ninth Circuit's acceptance of the method of statistical analysis used in this case.

### C. The Decree's Hiring Goals Are Narrowly Tailored To Reflect Historical Practices.

In approving the long term hiring goal of forty percent for minorities, the District Court relied on statistics showing the percentage of minorities in the City's population. At the trial level, the union objected to this goal because it did not reflect the relevant work force of the Standard Consolidated Statistical Area ("SCSA"). The trial court dismissed this objection in part because "residence in the City has always been a prerequisite for employment in the [Fire Department]." 696 F.Supp. at 1308 (Pet.App. 71a-72a).

In its appeal to the Ninth Circuit, Local 798 never argued that the decree's forty percent target for minorities should be changed to reflect the percentage of minorities in the SCSA. As discussed

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[3] At one point, the Ninth Circuit inadvertently misstated the statistical basis for the District Court's holding as reflecting a comparison with the general labor pool. 890 F.2d at 1446 (Pet.App. p. 14a). The facts recited by the Ninth Circuit, however, make clear that it understood that the applicant pool formed the actual basis for the statistical comparison relied upon by the District Court.

above, the union's petition confuses two distinct issues, each involving reference to a labor pool: first, a determination of a *prima facie* case based on the actual pool of qualified applicants, and second, the evaluation of a hiring goal based on the general labor market. The union failed to present either issue to the Ninth Circuit. Therefore, this Court should decline to consider the issue of the decree's long term hiring goal for minorities. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Even if the union had properly preserved the issue for this Court's consideration, the District Court's prior determination was consistent with this Court's opinion in *Wards Cove*. Since the WACO litigation in the early seventies, the Department had consistently required proof of residency for employment by the Fire Department. *See WACO v. Alioto*, 330 F.Supp. at 543. The applicant pool that supported the trial court's finding of adverse impact satisfied this requirement. Indeed, it would have been error for the trial court to disregard the actual hiring practices of the employer and redraw the relevant labor force for purposes of determining a target goal. *See Hazelwood School Dist.*, 433 U.S. at 312. Therefore, petitioner's second basis for review is without merit.

## III

### The Consent Decree Properly Limited Promotions To Persons Of Demonstrated Qualifications.

In its third argument, Local 798 maintains that the decree requires the promotion of persons who have not demonstrated their qualifications based on a competitive examination. The union argues that the decree's failure to require all candidates for promotion to pass a test is a violation of Title VII and equal protection.

The implication of the union's argument is that the City should have postponed all promotions until it had administered an examination to establish the qualifications of all candidates. This Court has recognized that a temporary departure from strict examination requirements may be necessary to avoid perpetuating

the effects of prior discrimination while meeting the demands of continuing operations.

> Finally, a District Court may find it necessary to order interim hiring or promotional goals pending the development of non-discriminatory hiring or promotional procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring or promotions or continued use of a discriminatory selection procedure.

*Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 450-451 (1986). In the instant case, the cost of an additional delay in promotions was severe. As the District Court recognized, the failure to have permanent supervisors imperiled fire suppression and other activities critical to public safety. 696 F.Supp. at 1309 (Pet.App. p. 73a).

This Court has never imposed a statutory or constitutional requirement that an employer must be satisfied through competitive testing that a person possesses the qualifications for promotion. Instead, this Court has focused on the flexibility of affirmative action requirements to ensure that qualified individuals are hired or promoted. *Paradise*, 480 U.S. at 171. The decree, as modified by the District Court, satisfies this interest. The District Court clarified that the City was under no obligation to promote unqualified individuals. The Court modified the decree to require that each candidate's work history and performance evaluations would be considered in making the promotions. 696 F.Supp. at 1306 (Pet. App. pp. 67a-68a).

The City had twice failed to administer valid examinations for lieutenant promotions. To delay promotions until satisfactory promotional procedures had been established would have exacerbated the past effects of the City's failures and impaired the Department's operations. The decree's requirement that only persons of demonstrated skill and experience receive promotions was an appropriate resolution that satisfied both statutory and constitutional demands.

## IV

**The Ninth Circuit Properly Approved A Consent Decree Requiring Temporary And Narrowly Defined Remedies To Eradicate The Clearly Established Effects Of Prior Discrimination.**

As its final basis for the writ, petitioner asserts that the Ninth Circuit approved a decree designed not to remedy the effects of prior discrimination, but to maintain a racially balanced work force. The union relies heavily on the District Court's 1987 order, in which the Court declared that the evidence before it did not justify the imposition of affirmative relief.

Petitioner's argument mistakenly equates the standards governing court-ordered relief and those governing voluntary affirmative action programs. Even if the evidence before the trial court in February 1987 constituted the entire factual support for the decree, the District Court properly could have approved the decree's affirmative relief provisions. A trial court is not prohibited from approving a consent decree "merely because the decree provides broader relief than the court could have awarded after trial." *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 525 (1986). The test of such a decree is not what a court could have awarded, but whether the race-conscious remedies are consistent with the requirements of Title VII and the demands of equal protection. *Id.* at 530 (O'Connor, J. concurring).

Although voluntary relief may exceed court-imposed remedies in certain cases, that issue is not raised by the instant case. The Ninth Circuit was not presented with a plan for voluntary affirmative action based solely on facts that would not have supported comparable court-ordered relief. The decree reflects evidence that was not before the trial court in February 1987. The City entered into the decree mindful of the risk that certain facts might be established at trial that would support more drastic remedies than those mandated by the consent decree. The District Court made a careful inquiry into the evidence which had been disclosed before trial when it approved the decree.

This Court has repeatedly affirmed the value of voluntary compliance to carry out the goals of Title VII. *United Steelworkers v. Weber,* 443 U.S. 193, 204 (1979); *Johnson v. Transportation Agency,* 480 U.S. 616, 630 (1987). This goal would be defeated if a municipality were required to admit past intentional discrimination to justify its decision to agree to a voluntary program of affirmative action. *Johnson,* 480 U.S. at 652 (O'Connor, J., concurring). Rather, the public employer must be confronted with a "firm basis" for believing that remedial relief is necesary to correct past or present discrimination. *Wygant,* 476 U.S. at 286. The trial court must inquire into the sufficiency of this evidence and cannot rely merely on the employer's declarations of intent. *Croson,* 109 S.Ct. at 724.

This Court has cautioned against reliance solely on evidence of a statistical imbalance between an employer's work force and the percentage of minorities in the relevant labor market as a basis for concluding that discrimination has occurred. Although in some cases a gross statistical disparity may support a *prima facie* case, *see Hazelwood School Dist.,* 433 U.S. at 307-308, such a comparison may fail to take into account other factors, such as societal discrimination, unrelated to the employer's active or passive participation in discrimination. *Croson,* 109 S.Ct. at 720.

In its assessment of the fairness and legality of the consent decree, the District Court carefully avoided reliance on evidence of discrimination that could not be linked to the Department's employment practices or other operations. As noted above, the *prima facie* case rested on the effects of the Department's hiring and promotional procedures on the actual pool of qualified applicants. As the Court found in its 1987 order, the adverse impact of the recent entry and lieutenant examinations extended the City's long line of failures to remedy discriminatory employment practices.

The California Court of Appeal's decision in the FEHC litigation was important as further evidence of this pattern. In its petition, the union dismisses the value of this finding. The District Court, however, carefully avoided ruling on the plaintiff-intervenors' request for remedial relief until the challenges to the earlier promotional examination were finally resolved. The determination

that the 1978 lieutenant examination violated the standards of Title VII completed a link between the effects of the entry-level practices condemned in the WACO litigation and the first promotional opportunities afforded minority firefighters who had entered the Department. Because the next promotional examination, the 1984 lieutenant examination, also had adverse impact, promotional opportunities for minorities had been largely foreclosed for a decade. This pattern of adverse impact produced by invalid examinations at the entry and first promotional stages would, taken together, justify affirmative relief. *Sheet Metal Workers,* 478 U.S. at 477.

The District Court also found "significant evidence regarding racial harassment" that was added to the record after the issuance of the 1987 order. 696 F.Supp. at 1308 (Pet.App. p. 70a). Prior to the entry of the order approving the consent decree, the Court made specific findings that the Fire Department had failed to carry out its obligations to prohibit racial harassment and that "delays in investigating charges of harassment suggested an atmosphere of toleration for such incidents." *Id.* at 1298 (Pet.App. p. 50a).

The existence of an atmosphere of racial hostility is itself a reason to conclude that more common forms of relief will not be adequate. A hostile work environment discourages qualified minorities from seeking employment and prevents minority employees from obtaining the experience and training necessary for promotional advancement. In such cases, "affirmative race-conscious relief may be the only means available 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.' " *Sheet Metal Workers,* 478 U.S. at 450 (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800 (1973)). In the instant case, the plaintiff-intervenors' allegations that the Department had tolerated or encouraged a pervasive atmosphere of racial hostility were never resolved at trial. The District Court's findings, however, clearly formed a strong basis for the City to believe that affirmative steps were necessary to remedy the effects of past discrimination.

The remedial provisions of the consent decree were narrowly tailored to conform to the evidence of past discrimination. The immediate promotions to the rank of lieutenant were designed to overcome those barriers that had blocked the advancement of minorities, a situation unredressed by the WACO litigation. These promotions also broke down the racial stratification between entry-level firefighters and supervisors that likely contributed to the evidence of racial harassment noted by the District Court. These one-time promotional remedies were an essential part of a decree designed "to dismantle prior patterns of employment discrimination and to prevent discrimination in the future." *Sheet Metal Workers,* 478 U.S. at 474 (plurality opinion). The decree ensures a fair possibility for future promotions by requiring a schedule of examinations and providing meaningful opportunities to compete for higher level, supervisory positions. Therefore, both the basis justifying affirmative action and the means to effect this objective meet the most stringent test required by this Court.

## CONCLUSION

For the reasons set forth above, the writ of certiorari should be denied.

Respectfully submitted,

LOUISE H. RENNE
City Attorney
(Counsel of Record)
GEORGE A. RILEY
CHRISTINA HALL
Deputy City Attorneys
400 Van Ness Avenue
Room 206
San Francisco, CA 94104
(415) 554-6221
*Attorneys for Respondent*
*CITY AND COUNTY OF*
*SAN FRANCISCO*

## RESPONDENT'S APPENDIX

A. Brief of Appellant, San Francisco Fire Fighters Local 798, *United States, et al., v. The City and County of San Francisco, et al.*, Case Nos. 88-1905, 88-2735, 88-2884, 88-15473, 88-15474, filed with the Ninth Circuit Court of Appeals

## APPENDIX A

IN THE

# United States Court of Appeals

## FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff,*

FONTAINE DAVIS, et al.,
*Plaintiffs in Intervention,*

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,
*Defendants,*

SAN FRANCISCO FIRE FIGHTERS, LOCAL 798,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS,
AFL-CIO,
*Defendant in Intervention.*

FONTAINE DAVIS, et al.,
*Plaintiffs,*

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,
*Defendants.*

Nos. 88-2735
88-2884
88-15473
88-15474
(Consolidated)

District Court Nos.
C84-7089 MHP &
C84-1100 MHP

**Appeals of Orders of the United States District Court for the Northern District of California**

## BRIEF OF APPELLANT

DUANE W. RENO
DAVIS, RENO & COURTNEY
90 New Montgomery, Suite 909
San Francisco, CA 94105
(415) 543-1900
*Attorneys for Defendant-In-Intervention Local 798*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

U.S.A. vs. City and County of San Francisco

Nos. 88-2735
88-2884
88-15473
88-15474

Rule 28-2.1 Certificate

The undersigned, counsel of record for Appellant, certifies that the following have an interest in the outcome of this case: In addition to Appellant Local 798 and all parties to this action, all employees and all potential future employees (i.e. applicants) of the San Francisco Fire Department.

These representations are made to enable judges of the court to evaluate possible recusal.

DUANE W. RENO
Duane W. Reno
*Attorney of Record for Appellant*

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**Appeals of Orders of the United States District Court for the Northern District of California**

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**BRIEF OF APPELLANT**

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## I

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review in these consolidated appeals are:

(1) Whether the evidence in the record was sufficient under Title VII of the Civil Rights Act of 1964 and the United States Constitution to justify the affirmative, race and sex-conscious relief provided by the consent decree that is the subject of these appeals.

(2) Whether the District Court erred in applying a constitutional equal protection analysis of the consent decree that utilized a standard more lenient than the traditional "strict scrutiny."

(3) Whether the relief granted by the consent decree was sufficiently narrowly tailored to its goals as required under Title VII and the 14th Amendment.

(4) Whether the terms of the consent decree entered into by defendants and plaintiff-intervenors were fundamentally fair, adequate and reasonable.

(5) Whether Defendant-intervenor Local 798 has standing to challenge the race-conscious assignment of seniority to employees who obtained promotions pursuant to the consent decree.

(6) Whether the District Court erred in denying Local 798's request for an injunction restraining Defendant City and County of San Francisco from assigning seniority on the basis of race and/or ethnic origin to employees who obtained promotions pursuant to the consent decree.

## II

## STATEMENT OF JURISDICTION

The statutory basis of subject matter jurisdiction of the District Court is found at 42 U.S.C. § 2003 *et seq.*, Title VII of the Civil Rights Act of 1964, as amended.

Three of the orders at issue in these consolidated appeals together approve the consent decree, and are orders of the District Court properly reviewed by this Court prusuant to 28 U.S.C. §§ 2106 and 1292(a)(1). The last two orders at issue in these consolidated appeals deny requests for injunctive relief, and are properly reviewed pursuant to 28 U.S.C. § 1292(a)(1).

The first and second orders on appeal herein were each entered by the District Court on 5/25/88. (CR 916 and CR 917) Defendant-in-intervention San Francisco Fire Fighters Local 798, IAFF, AFL-CIO (herein "Appellant" or "Local 798" or "Union") filed its Notice of Appeal of these orders (CR 920) on 5/31/88, within the time permitted by Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

The third order on appeal herein was enterd by the District Court on 6/10/88. (CR 922) The Union filed its Notice of Appeal of this order (CR 927) on 6/15/88, also within the time permitted by F.R.A.P. 4(a)(1).

The fourth order on appeal herein was announced by the District Court on 9/26/88. The Union filed its Notice of Appeal of this order on 10/6/88, within the time permitted by F.R.A.P. 4(a)(1). (CR 1046)

The fifth order on appeal herein was announced by the District Court on 10/17/88. The Union filed its Notice of Appeal of this order on 10/17/88, wihtin the time permitted by F.R.A.P. 4(a)(1). (CR 1053)

## III

## STATEMENT OF THE CASE

### A. Introduction

This is an appeal by Local 798 from the District Court's approval and authorization of a Consent Decree entered into on 11/12/87 by defendants and plaintiff-intervenors in order to "avoid the delay and expense of continued litigation" and to "insure that any disadvantage to minorities and females that may have resulted from past employment practices be remedied so that equal employment opportunity will be provided to all." (CR

695:4) Local 798 also appeals from the denial by the District Court of the Union's request for injunctive relief restraining Defendant City and County of San Francisco from assigning seniority on the basis of race and/or ethnic origin to employees who obtained promotions pursuant to the consent decree.

**B. Background Of This Litigation**

**1. The Challenge Of The Entry-Level Firefighter Exam In "WACO"**

In 1970 the N.A.A.C.P. and various other community organizations brought suit against the City and County of San Francisco for employment discrimination in *Western Addition Community Organization [WACO] v. Alioto,* C-70-1335 WTS. At that time, only four out of 1800 uniformed firefighters employed by the San Francisco Fire Department (herein "SFFD") were Black. *See WACO v. Alioto,* 330 F.Supp. 536, 538 (N.D. Cal. 1971) (*"WACO I"*). The *WACO I* plaintiffs challenged the validity of the written component of the 1968 entry-level firefighter test. *WACO I, supra,* at 537, 538. The *WACO I* court found that this test adversely impacted minority applicants and ordered the City to modify it. *WACO I, supra,* at 540.

A modified exam was given later that year, but it was also found to have an adverse impact on minorities. The court enjoined the City from using this exam after the City failed to establish that the modified exam was job-related. *WACO v. Alioto,* 340 F.Supp. 1351, 1356 (N.D.Cal. 1972). (*"WACO II"*).

In 1973 the Court was presented with a new written test, but again the court found that the City could not demonstrate the validity of the test. *See WACO v. Alioto,* 360 F.Supp. 733, 739-741 (N.D. Cal. 1973) (*"WACO III"*). The court ordered the City not to use written portion of the 1973 test for ranking purposes and ordered the Civil Service Commission to empirically validate that part of the test. *WACO III, supra,* at 740.

Later in 1973 the court imposed a 50% cut-off score for that test, at which only 4 persons—3 Blacks and 1 Asian—did not pass. Employment was then offered to persons on the resulting list of eligibles on a 1-minority to 1-non-minority basis, until all

minority applicants had been hired. *WACO v. Alioto,* 369 F.Supp. 77, 80-81 (N.D. Cal. 1973) (*"WACO IV"),* app. dism'd, 514 F.2d 542 (9th Cir. 1975), cert.den. 423 U.S. 1014 (1975).

In 1976 the City presented new entry-level exams, which used the 1973 multiple choice test with a cut-off score of 70% and which constitute 40% of the total score used to determine the rank order of applicants on the list of eligibles. Applicants also had to pass a physical agility test (PAT), which constituted 60% of the total score.

On 5/18/77 the District Court approved a consent decree which terminated the *WACO* litigation. In the decree, the court stated that "plaintiffs have demonstrated a prima facie case of racial and national origin discrimination in defendants' manner of entry-level firefighter selection . . . " (CR 426:6). This decree, which established guidelines for the use of exam components from the new 1976 entry-level exam, and which stated as a "goal" that the eligible list reflects 40% minority representation, expired by its own terms in 1982. (CR 426:6)

As of November 1987, 10 years after the entry of the *WACO* Consent Decree, over 55% of the minority firefighters working in the SFFD had been hired pursuant to the affirmative relief granted in 1973 by *WACO IV, supra.* (CR 694:8)

**2. The Challenge Of The 1978 Promotional Lieutenants' Exam**

During 1980 the California Department of Fair Employment and Housing (DFEH) received 10 complaints from Black firefighters alleging that an exam given in 1978 for promotion to the rank of lieutenant in the SFFD was discriminatory. This exam consisted solely of a written test of an examinees's knowledge of firefighting strategy and technique, arson detection, equipment maintenance, rescue and emergency medical procedures, and report writing. *See City and County of San Francisco v. FEHC,* 191 Cal.App.3d 976, 980-81 (1987). (CR 922:12) After an administrative hearing, the California Fair Employment and Housing Commission (herein "FEHC") determined that this exam had an adverse impact on Black applicants and that the City had failed to show that the exam was sufficiently job-related

under state law to be deemed valid. *CCSF v. FEHC, supra,* at 982.

A superior court decision vacating the decision of the FEHC was reversed by the California Court of Appeal, which held that the FEHC's findings had been supported by the evidence. *CCSF v. FEHC, supra,* at 982, 990, 994. This Court of Appeal decision has become final and was held by the District Court in its 5/25/88 (ancillary) order to have preclusive effect in this litigation. (CR 916:2)

The California Court of Appeal held that the DFEH had established a prima facie case of discrimination by revealing a significant disparity between the passing rates of white and Black examinees. The Court applied the four-fifths rule of the *Uniform Guidelines On Employee Selection Procedures,* 29 C.F.R. Section 1607.1 *et seq.,* which provides that a selection rate among minority applicants of less than 80% of the rate of the group with the highest selection rate (usually non-minorities) is considered strong evidence of an adverse impact. *Uniform Guidelines, supra,* 29 C.F.R. Section 1607.4(D), as cited in *CCSF v. FEHC, supra,* at 986-987.

Having determined that this test had an adverse impact upon Black applicants, the court concluded that substantial evidence supported the FEHC's findings that the test was unrelated to the job of fire lieutenant, and was thus not validated, for the reason that written tests alone are an inappropriate measure of the supervisory skills required of a fire lieutenant. *CCSF v. FEHC, supra,* at 990.

In order to avoid the possibility of inconsistent relief vis-a-vis the above-mentioned state court action and the current litigation, the Court of Appeal vacated the relief ordered by the FEHC and deferred the granting of relief pending the outcome of this litigation. *CCSF v. FEHC, supra,* at 944. (CR 922:15)

**3. Current Litigation Re: Entry-Level and Promotional Exams**

Upon the expiration of the *WACO* Consent Decree in 1982, the City administered a new entry-level test in 1982-83, and a new lieutenant's test in 1984. The City also administered a promo-

tional examination for the position of fire inspector in 1984. (CR 426:8; CR 922:16) After the results of the 1982-83 entry-level test were posted, the United States and plaintiff-intervenors Fontaine Davis, et al. brought separate suits in the United States District Court for the Northern District of California over the alleged failure by the City to correct the effects of past discrimination and for its allegedly continued use of invalid hiring procedures that have an adverse impact on women and minorities. The United States sought relief for Black, Asian, and Hispanic applicants. The plaintiff-intervenors sued on behalf of women and Blacks, and added claims for "racial harassment." Asian and Hispanic intervenors subsequently were joined in the action, along with individual claims for relief. (CR 922:16) These actions were assigned to District Judge Marilyn Hall Patel for pre-trial proceedings and for trial.

These cases, consolidated in 1986, focused specifically on the allegedly adverse impact of the 1982-83 entry-level exam, the 1984 lieutenants' exam, and the 1984 fire inspectors's exam. The plaintiff-intervenors also alleged charges of racial harassment.

On 2/12/86 the District Court issued a preliminary injunction against the use by the City of the list of eligibles which resulted from the 1982-83 entry-level exam. (CR 154:15) Of the top scorers on this test who obtained places on the eligibility list, 66% were white, 19% Black, 5% Hispanic, and 8% Asian. None were women. (CR 694:12-13)

On 6/23/86 the District Court granted partial summary judgment that the 1982-83 entry-level written exam adversely impacted Blacks and that the 1982-83 entry-level Physical Agility Test (PAT) adversely impacted women. (CR 289:8-9)

On 10/23/86, vitually on the eve of trial, the City declared that it would not defend the validity of these entry-level and promotional exams. The three tests, along with all resulting eligibility lists, were subsequently cancelled. (CR 379) In response to the City's withdrawal of these tests and defenses of their validity, the United States and plaintiff-intervenors Fontaine Davis, et al. moved for summary judgment. (CR 389; CR 396; CR 408) On 2/26/87 the District Court granted their separate motions and

issued a permanent injunction. *See U.S. v. CCSF*, 656 F.Supp. 276 (N.D. Cal.1987). (CR 426) This 2/26/87 injunction, which was to remain in effect for 5 years, prohibited violations of Title VII by the SFFD or the toleration of such violations by any SFFD employees; required the institution of recruitment and training programs; required new test development according to the *Uniform Guidelines*; set forth a schedule for test development deadlines; and required semiannual progress reports to the court. (CR 426) In addition, this injunctive order provided for provisional interim hiring to avoid a "staffing emergency." (CR 426)

On 2/5/88, in response to allegations by plaintiff-intervenors that defendants were in contempt of this 2/26/87 order, the District Court issued a broad-sweeping injunction binding the SFFD and 61 officers, in their individual capacities, to carry out the terms of this new injunction, under penalty of contempt. (CR 879) This 2/5/88 injunction is the subject of a separate appeal in this Court. (No. 88-1905) (CR 884)

On 11/12/87 Defendant City and plaintiff-intervenors Fontaine Davis, et al. entered into the Consent Decree on appeal herein. (CR 695) A fairness hearing was held on 12/22/87. (CR 840) The United States, Local 798, and numerous individuals filed objections to the decree. (CR 714-737, 739-819, 821-835, 841-846) At a hearing on 5/20/88 Judge Patel announced that she had approved the decree. (CR 912) This approval was finalized in the 5/25/88 and 6/10/88 orders at issue herein. (CR 916; CR 917; CR 922) The United States and Local 798 filed timely notices of appeal of those orders. (CR 920, 927, 970)

In her order of 5/25/88 Judge Patel stated that her delay in approving the decree had resulted from a need to modify and finalize the "findings" in support of it. (CR 912:57)

On 5/25/88 Judge Patel also signed an "Order Granting Partial Summary Judgment" ("ancillary order"), granting the motion of plaintiff-intervenors to hold the 1978 lieutenants' exam invalid, and further ordered that all promotions to captain from the existing captains' eligibility list were to be stayed until Black employees promoted to the rank of lieutenant pursuant to the

decree had conpleted a make-up captains' exam and had their scores integrated into that eligibility list. (CR 916)

On 6/13/88 this Court granted a petition from Local 798 for a temporary stay of the consent decree pending the outcome of this appeal. Upon petition from the City for a dissolution of that stay prior to the start of the 1988-89 fiscal year in order that a number of promotions to lieutenant that were to be made under the decree could be effectuated prior to certain anticipated budget reductions, this Court issued an order on June 30, 1988, dissolving the temporary stay. The City thereupon granted promotions to the rank of lieutenant to 76 of the employees who had taken the 1984 exam for that rank.[1]

The City assigned seniority in the rank of lieutenant to these 76 employees on the basis of their race and/or ethnic origin notwithstanding the absence of any provision in the consent decree for the assignment of those privileges in a race-conscious manner. Upon becoming aware of this fact, Local 798 sought injunctive relief from the District Court against that action. (CR 1024-1027, 1040-1043) After expressing the opinion at a hearing on 9/26/88 that Local 798 had no standing to challenge such action by the City because it was not a party to the consent decree, Judge Patel advised the parties that they need not respond to Local 798's motion. (RT 30) At a subsequent hearing on 10/17/88, Judge Patel stated that she was denying Local 798's motion on the grounds that Local 798 had no standing and also that its motion was of no merit. (RT 8-9).

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[1] Local 798 based its request to this Court for a stay order on the holding in *San Francisco Police Officers Assn. v. City and County of San Francisco*, 842 F.2d 1126 (9th Cir. 1988) (petition pending for rehearing *en banc*), that an appeal in a similar action had become moot upon the promotion of the minority employees who were the beneficiaries of race-conscious actions on the part of the City. The decision of this Court dissolving the temporary stay stated that the Court would issue an opinion explaining that action "in due course." This opinion has yet to be issued. Local 798 assumes that this Court would not have dissolved its temporary stay if the result of that action would be to deprive Local 798 of any remedy by way of its appeal.

On December 2, 1988, the attorneys for plaintiff-intervenors Fontaine Davis, et al. served defendants and defendants-in-intervention with notice of a motion to be heard on April 17, 1988, for an award of attorneys' fees to them in the amount of $3,998,633.22 for their work up to May 20, 1988, which was the date of the last work done by them prior to approval of the consent decree by Judge Patel. (Excerpts of Record, pp. 356-400; see p. 365 for statement of claimed amount) Their memorandum of points and authorities in support of this motion asserts that "The result [of their efforts in this litigation] is *a decree of far greater breadth and scope than almost all other employment discrimination litigation.*" (Excerpts of Record, p. 385, lns. 14-16) (emphasis added)

### C. Decision Of The District Court

Judge Patel's decision approving the consent decree stated that she reviewed the terms of the decree "not only for the fairness of its terms, but also to insure its statutory and constitutional validity." (CR 922:28)

#### 1. Fairness Of The Terms Of The Decree

Judge Patel found the terms of the decree "fair, adequate and reasonable" based not only upon the reactions of interested parties as evidenced by the fairness hearing, but also upon additional factors not presented at the hearing, such as "the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; and the extent of discovery and state of the proceedings." (CR 922:29, citing factors discussed in *Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615, 625 (9th Cir. 1982), cert.den., 459 U.S. 1217 (1983); CR 922:54)

After acknowledging that "113 persons took the time and effort to file written objections," the Court categorized these objections and then set forth its findings of fairness with respect to each category. (CR 922:39-44) These specific objections are dealt with in Part V, Section C below.

### 2. Satisfaction Of The Applicable Legal Standards

The Court further found that the Consent Decree was "narrowly tailored to serve a compelling governmental purpose" (CR 922:54) and as such satisfied the legal standards required by both Title VII and the equal protection clause of the 14th Amendment governing settlements affording race and sex-conscious relief in which a governmental entity is a party. (CR 922:29-37)

The Court analyzed the legality of the decree under a two-pronged test, i.e. (1) whether there was adequate [evidentiary] justification for the use of the affirmative action plan, and (2) if so, then whether the plan was sufficiently narrwly tailored toward achieving the particular relief (i.e., or whether it unnecessarily burdened the rights of non-minority employees). (CR 922:29-30)

Applying the first prong of the analysis, the Court found that the decree was adequately justified by evidence of: (1) "the City's pattern and practice of discrimination in hiring and promotion on the basis of race and sex" (CR 922:44); (2) "statistical disparities" shown by plaintiff-intervenors; and (3) the concession by the City that the challenged tests were not "demonstrably job-related" and its failure to produce "valid employee selection procedures." (CR 922:44-45)

In evaluating whether the "justifiable" affirmative action plan in the decree was sufficiently narrowly tailored to satisfy the second prong of the analysis, the Court found that affirmative race- conscious relief was "the *only* effective means to assure the enjoyment of equal employment opportunity and to prevent further delays by the City." (CR 922:45) (Emphasis added) The court considered several factors in making this analysis, and found: (1) that the affirmative relief did not "unnecessarily trammel the rights of or uproot the legitimate expectations of non-minority or male employees and therefore [did] not impose an unacceptable burden" (CR 922:51-52); (2) did not require "rigid quotas," but rather was "highly flexible" with respect to hiring goals and specific minority hiring requirements" (CR 922:49); (3) was reasonable with respect to the "temporary duration of the affirmative action plan" (e.g. 7 yrs) (CR 922:50);

(4) was reasonable in that the numerical relief afforded was "closely related to the relevant labor force" (CR 922:50); (5) did not impose an "absolute bar to the advancement of white males" (CR 922:52); and (6) did not mandate, or even permit, "blind hiring." (CR 922:53, applying factors outlined in *Johnson v. Transportation Agency,* ____ U.S. ____, 107 S.Ct. 1442, 1454-56 (1987); *United States v. Paradise,* ____ U.S. ____, 107 S.Ct. 1053, 1067 (1987); and *Higgins v. City of Vallejo,* 823 F.2d 351, 3357 (9th Cir. 1987)).

Unlike the "fairness" objections which were filed primarily by individual firefighters and members of the public (CR 922:39-44), the objections which related to the application of the legal standards set forth above were filed primarily by the Union. (CR 922:45-55) These objections and the Court's findings with respect to them are dealt with in Part V, Sections A and B below.

**D. Provisions Of The Consent Decree**

The effect of the Consent Decree was to settle all of the remaining existing disputes between the private plaintiffs (plaintiff-intervenors) and defendents as to "appropriate and valid procedures for the hiring and promotion of firefighters" for the SFFD. The decree also resolved all claims of the private plaintiffs set forth in their complaints and previous orders of the District Court concerning discrimination on the basis of race, ethnic background, national origin, or sex. Futhermore, the decree set forth specific guidelines to be followed by defendants in achieving certain goals for employment of women and minorities in the SFFD. (CR 695:5)

The broad provisions of the decree are outlined below:

**1. General Provisions**

The decree incorporated relevant portions of the permanent injunctive relief set forth in th Court's 2/26/87 order. (CR 695:6) and Ex. A)

The decree provided that the City shall continue to require that all applicants for the position of H-2 entry-level firefighter be *bona fide* residents of San Francisco at the time of, and for a period of 4 months prior to the time of, their application, and

through the date of their appointment. The "City and County of San Francisco" was specified as the relevant geographic labor market. (CR 695:6)

The decree established a test development committee to develop and administer all entrance and promotional exams required by the decree. (CR 695:7-8)

The decree stated that each hiring and promotional "goal" (discussed below) constituted a target figure to be reached within a specified time period. Any failure to meet a goal must be justified to the Court. (CR 695:9-10) The decree further stated that goals shall not be interpreted to require the hiring or promotion of unqualified persons. (CR 695:7-8)

**2. Hiring Goals**

The decree established long term hiring goals of 40% minority and 10% female representation in the SFFD. These goals were made subject to the availability of qualified persons. (CR 695:8) The failure to meet these goals by reason of an exam or selection procedure was not to be justified unless that procedure was proven valid under the *Uniform Guidelines, supra.* (CR 695:8)

The provisional firefighters hired pursuant to the Court's 2/26/87 permanent injunction were to be given a special test by 10/1/88, and those who passed were to receive permanent appointments retroactive to their hiring date. (CR 695:9)

The decree provided that at least 500 entry-level firefighters must be hired during the life of the 7-year decree. Of the 10% goal for women in entry-level hiring, at least 50% were to be minority women, and a higher goal was permitted if there were enough qualified candidates. The decree imposed a 55% goal for minorities in entry-level hiring. The minimum goal for each minority group protected by the decree was to be the percentage reflected in the 1980 and 1990 census. As of the date of the decree these percentages were 19% Asian, 10% Black and 11% Hispanic. (CR 695:10-11)

If the City decided to test less than those who apply, the decree required that the testing pool reflect the applicant pool, and be selected at random. (CR 695:11)

### 3. Promotions

The decree required the promotion of six named Black employees to the rank of lieutenant, retroactive to 3/9/77, with back pay. (CR 695:11) In addition, the decree required that a special "make-up" exam for promotion to the rank of captain be given to these six men by 4/1/88. (CR 695:11-12) The results of this "make-up" exam were to be integrated into the existing list for promotion to fire captain. At that time, the "freeze" on promotions from that pre-existing list (effectuated by the Court's 5/25/88 ancillary order—CR 916) was to be lifted, and those Black lieutenants whose scores on the make-up exam placed them within the range of those already chosen for promotion to captain were to be immediately promoted. The other Black lieutenants who passed the make-up captains' exam were to remain on the eligibility list until they were promoted or the list expired. (CR 695:12)

The decree established that the "goal" for the promotion of minorities and women for each exam given during the life of the decree was that such promotions reflect minority representation in the applicant pool. This applicant pool was defined as those who both are eligible and apply. (CR 695:12)

The decree also set forth a lengthy schedule for the accelerated administration of promotional tests, which was designed to "maximize the opportunity for advancement and promotion of all members" of the SFFD, particularly "minorities and women." The first promotional exam was to be held no later than 12/31/88 and the last to be held no later than 12/31/94. (CR 695:13-15) All eligibility lists provided for in the decree were to expire after 2 years, unless extended by the Court. (CR 695:15) The decree also replaced all applicable provisions of the San Francisco City Charter with its own provisions for an expedited resolution of disputes concerning exams given pursuant to the decree. (CR 695:15-16)

Finallly, the promotional provisions of the decree provided that within 60 days of execution of the decree, the SFFD was to promote (in addition to the six Black employees earlier named) 11 Black, 8 Hispanic, and 8 Asian or Filipino firefighters, selected

from the highest scores on the 1984 lieutenant exam. The SFFD was also permitted to promote an additional 48 lieutenants using the results of the 1984 lieutenant exam in rank order. (CR 695:16-17) Of those promoted, 25% were to be minorities, with each minority group receiving its pro-rata share of appointments. If the SFFD promoted all 48 allowed, 5 were to be Black, 5 Hispanic, and 2 Asian or Filipino. The decree prohibited the promotion to lieutenant of any person found by the Court to have violated federal civil rights laws. (CR 695:16-17)

## E. Evidence Presented To The District Court

### 1. Undisputed Facts

Although the Court stated that it relied both on a "Stipulation of Undisputed Facts" filed 8/15/86 (CR 334) and on the "Statement of Undisputed Facts" filed with the Consent Decree on 11/12/87 (CR 922:3), the most recent statement contained the same basic facts as the earlier one, and the Court made only one reference to the earlier version (CR 922:9), which was duplicated in the recent version. (CR 694:para. 5) That version provides:

*Paragraphs 1-4.* No women were permitted to apply for the position of entry-level firefighter in the SFFD until 1976, when 313 women applied. None passed the physical agility test ("PAT") that year. The same PAT was used in 1983. The first women were hired in August 1987.

*Paragraphs 5-6.* In 1970, 4 out of 1,800 uniformed fire personnel were Black. The fifth Black was hired in 1971. Out of 1,380 uniformed personnel in 1985, 5.7% were Black, 6.38% were Hispanic and 2.5% were Asian.

*Paragraphs 7-9.* As of November 1987 there were 210 permanent lieutenant positions, 80 permanent captain positions, and 62 chief officer positions in the SFFD. These positions included 3 Black and 12 Hispanic lieutenants, 1 Black and 3 Hispanic captains, 1 Black and 1 Hispanic chiefs, and no Asians.

*Paragraphs 10-14.* These paragraphs attested to the invalidity of the 1968 and 1971 entry-level exams at issue in the *WACO* litigation. (*See* Part III, Section B)

*Paragraphs 15-16.* The 48th through 61st Fire College classes, beginning in 1974, were appointed from the "E-25" entry-level eligibility list. Beginning with this 48th class, the SFFD revised the procedures for evaluating persons in the Fire College to include weekly equipment manipulation testing and termination procedures for those who failed. Of 426 persons appointed to these classes, 14 were terminated. Of those terminated were 6 Blacks, 2 Hispanics, and 6 whites. Two of the terminated Blacks and 1 of the whites were rehired under the provisions of the *WACO V* Consent Decree, and eventually completed Fire College.

*Paragraph 17.* The 62nd through 72nd Fire College classes were appointed from an "E-26" eligibility list. Of the 293 persons appointed, 4 were terminated: 2 Blacks, 1 Hispanic, and 1 white.

*Paragraphs 18-21.* From 1972 through November, 1987, firefighters were appointed from 3 eligibility lists: "P-1," "E-25," and "E-26." Of the 21 persons appointed from the P-1 list were 15 blacks, 1 White, 2 Asians, 1 Hispanic and 2 "other non-whites." Of the 425 persons appointed to H-2 firefighter from the E-25 list were 45 Blacks, 37 Hispanics, 13 Asians and 1 "other non-white." Of the 293 persons appointed H-2 firefighter from the E-26 list were 28 Blacks, 24 Hispanics, 15 Asians and 2 "other non-whites."

*Paragraphs 22-24.* These paragraphs also attested to the invalidity of the 1971 (modified) entry-level exam, which was enjoined in *WACO II, supra.* (*See* Part III, Section B)

*Paragraphs 25-28.* These paragraphs attested to the City's inabililty to validate a revised entry-level test given in 1973. (*See WACO III*, Part III, Section B).

*Paragraph 29.* The *WACO* action (see above in Part III, Section B) was never certified as a class action.

*Paragraphs 30-32.* These paragraphs set forth the terms of the 1976 entry-level exam and the subsequent consent decree approved in *WACO V, supra,* (*See* Part III, Section B)

*Paragraphs 33-38.* These paragraphs attested to the challenges made to the 1978 lieutenants' promotional exam and the

court's finding that the exam was invalid. (*See* Part III, Section B above)

*Paragraphs 40-42.* (The statement included no Paragraph # 39) On 6/16/87 the Court of Appeal for the First Appellate District rendered an opinion, *CCSF v. FEHC, supra,* which had a collateral estoppel effect in this action. (*See* CR 916)

*Paragraphs 43-49.* These paragraphs related the facts concerning the City's administration of a new entry-level exam in 1982-83 and the statistics relating to the adverse impact this test apparently had upon minorities and women. (*See* Part III, Section B above).

*Paragraphs 50-52.* These paragraphs attested to the District Court's findings that the 1982-83 written exam adversely impacted Blacks and the 1982-83 PAT adversely impacted women. (*See* Part III, Section B above).

*Paragraphs 52-53.* These paragraphs set forth the weights of the components of the 1984 lieutenant exam, to wit: (1) written multiple choice job knowledge test, 37.2%; (2) written communications skills test, 7.1%; (3) leaderless group discussion test, 7.7%; and (4) structured oral interview, 33.0%. No passing or cut-off scores were established for any of the components. The City eventually declined to defend the validity of this exam. (*See* Part III, Section B, above)

*Paragraph 54.* The SFFD's procedure for handling complaints of racial harassment and/or unequal treatment is different from its procedure for handling violations of other SFFD rules and regulations.

*Paragrapah 55.* Prior to October, 1986, 2 white firefighters had been suspended as a result of investigations by SFFD for complaints of racial harassment and/or unequal treatment which were filed by Black firefighters.

**2. Hearing Testimony**

Following is a summary of the testimony presented at the "fairness hearing" held on 12/22/87 regarding the consent decree:

Dan Siegel, Deputy City Attorney, explained the City's motives for entering the decree (to avoid litigation), and addressed the issue of the evidentiary justification for the relief granted. (RT 23-24; CR 847:23-24) He stated that an analysis should not be made regarding evidentiary support of each provision, but rather the decree should be viewed as "a whole." (RT 24: CR 847:24) Thus what might be considered as "insufficient promotions" from the 1978 H-20 list would be balanced by possibly "too many" promotions from the 1984 list. (RT 25; CR 847:25)

Siegel then moved to an analysis of whether the relief was narrowly tailored as required by Title VII. (RT; 26 CR 847:26) He pointed to: (1) the pattern of underrepresentation of women and minorities in the SFFD; (2) the percent of whites who will incidentally benefit from the decree; (3) the fact that quotas were not rigidly set; and (4) the temporary nature of the decree, to conclude that the decree was sufficiently narrowly tailored in its provisions for affirmative relief. (RT 26-30; CR 847:26-30) Siegel next defended the use of the invalid 1984 H-20 lieutenants' exam for making 75 immediate promotions, stating that the City will make an "independent assessment of each of the persons who are promoted pursuant to the decree and will promote only those persons who are found to be qualified based upon an assessment of their work histories . . . their performance evaluations and so on." (RT 32; CR 847:32)

Finally, Siegel conceded that the immediate promotion of six Black firefighters to lieutenant from the invalid 1978 lieutenant exam could adversely impact Black Lieutenants Bryant and Armstrong by pushing their seniority for captains' positions down "a notch or two," but claimed this was a "minimal" impact. (RT 34, 36: CR 847:34-36)

Eva Paterson, attorney for plaintiff-intervenors, called two SFFD employees to testify that the decree was fair. Lt. Armstrong, who had filed an objection concerning the unfair effect the decree would have on his prospects for promotion to Captain, testified that he believed the decree was otherwise fair. (RT 52-56) Lt. Armstrong based his approval of the decree primarily on the "fact that the City or Civil Service hasn't been able to come

up with an examination that [would be] fair," both to himself and to whites. (RT 56; CR 847:56)

Lt. Lee also testified that the decree was fair. He believed certain white people had been given information in advance of the 1984 lieutenant exam so that they scored higher, and that Blacks, who "studied and studied," were not given this inside information. (RT 57-58; CR 847:57-58)

Firefighter Christopher Stevenson and Lt. Robert Demmons also spoke in favor of the decree. (RT 65-71; CR 847:65-71) Mr. Stevenson particularly liked the accelerated exam schedule, even though he stated that "the consent decree doesn't really totally satisfy any of the parties." (RT 66; CR 847:66) Lt. Demmons favored the decree because the unemployment rate for Blacks in San Francisco was "a lot higher than 4%" (RT 60; CR 847:69), and because of the "limitations that the law has on people gaining basic human and civil rights." (RT 71; CR 847:71)

Attorney McNeill then addressed the court with assurances that no unqualified persons would be promoted by the decree because "everyone in the fire department is probably qualified to be a lieutenant." (RT 79; CR 847:79)

Attorney Reno, representing Local 798, called SFFD employees to testify as to the unfairness of the decree. (RT 88-118; CR 84788-118) Chief John Flaherty, Lt. Leon Martinez, Chief's operator Brendan O'Leary, and Firefighter John O'Shea, who together had 84 years' experience with the SFFD, all agreed that experience alone does not qualify someone to be a lieutenant, and that an accurate exam is required. (RT 91-95, 101, 107, 116; CR 847:91-95, 101, 107, 116) Mr. Reno concluded that the evidence before the Court did not justify the broad affirmative relief granted by the decree in light of the City's good faith compliance with the *WACO V* hiring order, minority recruitment efforts, attempts to construct valid tests, and the criteria set forth in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 20 F.E.P. 1 (1979). (RT 8, 10, 11, 13-15, 26-30, 111-115; CR 847:8, 10, 11, 13-15, 26-30, 111-115) Specific objections brought up at the hearing are addressed below in Part V.

## IV

## SCOPE OF APPELLATE REVIEW

The District Court's approval of the Consent Decree pursuant to its orders dated 5/25/88 and 6/10/88 shall be reviewed on appeal herein under the "abuse of discretion" standard. *Berkman v. City of New York*, 705 F.2d 584 (2nd Cir. 1983) The District Court's denial of Local 798's motion for injunctive relief prohibiting the assignment of seniority on the basis of race and/or ethnic origin to employees promoted to the rank of lieutenant under the consent decree is reviewed *de novo* for an application of erroneous legal principles. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (*en banc*), *cert. den.* 469 U.S. 824 (1984); *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 465 (9th Cir. 1985).

## V

## ARGUMENT

The approval by the District Court of a consent decree resolving an employment discrimination action against a public agency constitutes an abuse of discretion if the decree contains provisions that are unreasonable, unlawful, or against public policy. *Berkman, supra,* at 587. *See also EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884 (7th Cir. 1985) and *William v. New Orleans*, 729 F.2d 1554 (8th Cir. 1984).

In *Berkman, supra*, the United States Court of Appeals for the Second Circuit affirmed a District Court order approving the parties' interim hiring agreement affecting women employees in the New York City Fire Department in a Title VII action. The court found no provisions in the parties' hiring agreement that were unreasonable, unlawful, or against public policy. *Berkman, supra*, at 597.

Unlike the *Berkman* agreement, the Consent Decree on appeal herein contains provisions that are unreasonable, unfair, in violation of both Title VII and the equal protection clause of the 14th Amendment, and against public policy, and as such, the District Court's approval of the decree was an abuse of discretion.

### A. The District Court Abused Its Discretion By Finding That The Evidence Justified Approval Of The Consent Decree's Affirmative Race and Sex Conscious Relief

An employer's voluntary affirmation action plan is valid under Title VII and the equal protection clause if the evidence of discrimination is sufficient to justify the use of such relief (subject to the further analysis of whether the relief has been properly tailored to the achievement of the employer's goals—*See* below in Part B). *Johnson v. Transportation, supra*, 107 S.Ct. at 1446, 1452; *Wygant v. Jackson Board of Education*, ____ U.S. ____, 106 S.Ct. 1842 (1986).

The evidence in the record of this action does not adequately support the Consent Decree's affirmative relief. The District Court's approval of such relief was therefore an abuse of discretion.

#### 1. The Affirmative Relief Provisions In The Decree Were Not Justified By The Evidence Required By A Title VII Analysis.

In a Title VII suit, once a plaintiff establishes a *prima facie* case that race or sex has been taken into account in an employment decision, the burden then shifts to the employer to articulate a nondiscriminatory rationale for its decision. Such a valid rationale would be either the existence of an affirmative action plan, or the implication of the extremely narrow "*bona fide* occupational qualification" exception to Title VII (42 U.S.C. Section 2000e-2(e)). The burden then shifts to the plaintiff to prove that the justification is "pretextual" and the plan invalid. *Johnson, supra*, at 1449, citing *McDonald Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973).

The Supreme Court has applied various factors in determining whether such a plan is factually justified, and has concluded that a plan adopted by an agency "to address a conspicuous imbalance in [that] agency's work force" or a "manifest . . . imbalance" in a traditionally segregated job category is initially justified (subject to being sufficiently narrowly tailored). *Johnson, supra*, at 1449, 1460; *See also Steelworkers v. Weber, supra*, 443 U.S. at 197.

There was no such factual justification underlying the broad affirmative relief provided for the Consent Decree.

In a case involving a Title VII consent decree, the court is required to become more involved than in an ordinary case. Even when all the parties agree to the settlement the court should:

> examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the *court's sanction on and power behind* a decree that violation constitution, statute or jurisprudence. This requires a determination that the proposal represents a *reasonable factual* and legal determination based on the *facts of the record,* whether established by evidence, affidavit or stipulation." *U.S. v. City of Miami,* 614 F.2d 1322, 22 FEP 846, aff'd in part and in part vacated and remanded on other grounds, 664 F.2d 435, at 441; 27 FEP 713 (5th Cir. 1981) (en banc) (Emphasis added)

The decree's affirmative relief consisted of hiring goals (500 entry-level firefighters over 7-10 years, 40% to be minorities and 10% to be women, 50% of women to be minorities) and promotional goals (specified numbers of minority employees promoted from 1984 lieutenant exam, 6 Blacks promoted from 1978 lieutenant exam, make-up captain exam to benefit specific Black employees, and schedule for accelerated promotional tests). (*See* Part III, Section D above) These far-reaching race-based and gender-based provisions were not justified by the evidence.

The 11/12/87 Statement of Undisputed Facts (CR 694) and the prior 8/15/86 Stipulation of Undisputed Facts (CR 334) demonstrate only that the San Francisco Civil Service Commission, the entity responsible for the administration of examinations for entrance into the Fire Department, has failed to administer entry-level or promotional examinations since 1968 which exhibited no adverse impact upon women or minority applicants.

However, the District Court had remedied these adverse effects prior to its approval of the 11/12/87 Consent Decree.

Remedies for the challenged 1971 and 1973 examinations were provided as part of the settlement of the *WACO* litigation in the

form of injunctions prohibiting hiring, setting lower cut-off scores and ordering one-for-one quota hiring of minorities. (*See* Part III, Sections B and E above) The 1977 *WACO* consent decree also mandated the manner in which the 1976 and 1982 entry-level exams were to be administered and used (CR 694, 11) It necessarily follows that the adverse effect of those examinations upon minority applicants cannot be deemed to have resulted from unlawful discrimination. The decree on appeal herein is intended to remedy a "pattern and practice of unlawful discrimination within the San Francisco Fire Department" for which there was no record as of 11/12/87 and for which there is no record now.

The Court had also already awarded permanent injunctive relief in response to a motion for partial summary judgment over claims arising from the administration of the 1982 entry level examination and the 1984 fire inspector and lieutenant promotional examinations.

That relief, ordered by the court on 2/26/87, provided, *inter alia*, for the development of new selection procedures to be valid under the requirements of the *Uniform Guidelines* and Title VII for the ranks of firefighter, inspector, and lieutenant, and prohibited the use of invalid selection procedures in other ranks. The order further provided that examinations for the above-identified ranks were to be administered by 3/31/88. The order required the defendants to undertake an aggressive recruitment program and imposed certain monitoring and record-keeping obligations to ensure compliance with the order. Finally, the order allowed defendants to hire a specified number of candidates from the 1982 entry-level list for firefighter on a provisional basis and in accordance with race and gender-conscious quotas to alleviate a critical shortage of firefighting personnel in the San Francisco Fire Department.

The Court specifically stated in its order of 2/26/87 that the evidentiary record before it at that time was insufficient to justify any relief beyond the injunctive relief and the provision for interim hiring referred to above:

> On a record limited only to the *bare fact* that the City administered and then cancelled, prior to hiring, certain

> invalid examinations, the court *as a matter of law cannot* find a discriminatory denial of individual employment opportunities violative of Title VII. *Memorandum Decision and Order Granting Plaintiffs' Motion For Partial Summary Judgment.* (CR 426:18-19) (Emphasis added)

The court also stated, in the same order, that it was:

> hesitant on the rather barren record of undisputed facts to attempt to identify the effects of past discrimination which possibly have lingered within the SFFD beyond the expiration of the *WACO* consent decree. (CR 426, *supra*)

The Statement of Undisputed Facts presented in support of the consent decree added no substantive facts to the record that was already before the court on 2/26/87, and which the Court, as indicated above, deemed to be too barren to warrant any relief other than the narrow injunctive relief granted at that time.

In its 6/10/88 Memorandum approving the Consent Decree, the Court pointed to only three pieces of "evidence" beyond that relied upon to support the prior 2/26/87 injunction: (1) the parties' stipulation that the SFFD's procedure for handling charges of racial harassment was "different from" that used for other violations (CR 922:20, citing CR 694:13); (2) the parties' stipulation that prior to October 1986 "only 2" white firefighters had been suspended as a result of complaints of racial harassment (CR 922:21, citing 694:14); and (3) the "sworn testimony" of SFFD Chief Phipps at the 1/14/88 contempt hearing concerning an incident in which a swastika plaque was allegedly placed in an office used by minority inspectors. (CR 922:21-23, citing CR 861 —hearing testimony)

The District Court found that these three additional pieces of evidence, combined with the admittedly "bare" record that existed on 2/26/87, constituted a pattern and practice of racial and sexual discrimination in the hiring and promotional practices of the SFFD justifying the broad affirmative relief contained in the decree. However, these three pieces of "evidence" had nothing to do with hiring or promotions. The "swastika incident" upon which the Court most heavily relied is still unresolved. The fact that "different" procedures are used in investigating racial harassment

claims than other violations may be evidence of the SFFD's attempt to deal *more* effectively with these claims. Finally, these three additional "facts" dealt with alleged racial discrimination only, and thus offered no support for the gender-based affirmative provisions in the decree.

If the record on 2/26/87 was an insufficient basis for relief beyond the injunction granted then, the record on 6/10/88 offered no greater support for the Court's approval of the decree.

**2. The Affirmative Relief Provisions In the Decree Were Not Justified By The Evidence Required By An Equal Protection Analysis.**

As discussed above, while an employer's affirmative action plan might withstand a Title VII attack by a showing of a "conspicuous imbalance" in its work force or by a "manifest imbalance" in the particular job category, a plan entered into by a municipality such as the City and County of San Francisco consititutes "state action" and therefore also invokes the greater scrutiny of the equal protection clause of the 14th Amendment. *Johnson v. Transportation, supra,* 107 S.Ct. at 1446, n.2; *Wygant, supra; Local Number 93 Int'l Ass'n of Firefighters v. City of Cleveland,* ___ U.S. ___, 106 S.Ct. 3063, 3077-3088 (1986).

The Supreme Court warned in *Local 93, supra, at 3077-3088*:

> the fact that the parties have consented to the relief contained in the decree does not render their action immune from attack on the ground that it violates Sec. 703 of Title VII or the Fourteenth Amendment.

Although it has been well established that government bodies "may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination" (*U.S. States v. Paradise, supra*, at 1064; *Local 28 of the Sheet Metal Workers' Int.'l Ass'n v. EEOC*, 478 U.S. 421, 106 S.CT. 3019 (1986); *Wygant, supra*, at 1853) the Supreme Court has consistently held under a constitutional analysis that an elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes. This traditional "strict scrutiny" test is generally satisfied by a showing that the relief is

"narrowly tailored" to serve a "compelling governmental purpose," evidenced by a showing of discrimination that is "egregious," i.e. pervasive, systematic, and obstinate. *U.S. v. Paradise, supra*, at 1064-1065, citing *Wygant, supra*, at 1846 and *NAACP v. Allen*, 340 F.Supp. 703, 705 (N.D. Ala. 1972).

Although on occasion the Supreme Court has articulated this test with different language (i.e. as requiring relief to be "substantially related to the achievement of important governmental objectives") (*See Univ. of California Regents v. Bakke*, 438 U.S. 265, 359, 98 S.Ct. 2733, 2783 (1978), as quoted by the dissent in *Wygant, supra*, at 1861), overall the court has recognized that "any racial classification is subject to misuse" and that even the seemingly lesser standard set forth above is "genuinely a 'strict and searching' judicial inquiry." *Wygant, supra*, at 1861, citing *Regents, supra*, at 362.

This District Court interpreted *Wygant* to stand for the proposition that a public employer's *"voluntary* adopted affirmative action plan" required evidence less than that generally required under an equal protection analysis. (CR 922:32) (Emphasis added) The Court relied on Justice O'Connor's "strong basis in evidence" standard (*Wygant, supra*, at 286) (O'Connor, J., concurring in plurality) to hold that "statistical evidence of disparity sufficient to support a prima facie case under Title VII would *justify voluntary* affirmative action consistent with the Constitution." (CR 922:33, citing *Wygant*, at 292) (Emphasis added)

This is inconsistent with the test under Title VII, set forth above, which provides that a prima facie case of statistical discrimination is rebutted by an affirmative action plan which *in turn* is rebutted by evidentiary justification.

There is no logic in interpreting equal protection requirements to be *more* lenient than those of Title VII, especially when it is generally accepted that the opposite holds true. (*See Johnson, supra*, at 1446; *Wygant, supra;* and *Local 93, supra*) In addition, to interpret constitutional requirements to be the same as those of Title VII is unsupported. The District Court's reasoning that this interpretation is selectively warranted for *voluntary* plans (but not

for court-ordered plans) is a misreading of *Wygant*. In *Wygant*, a public school board's voluntary plan extending preferential protection against layoffs to minority employees was found to have *violated* the 14th Amendment because no showing was made of prior racial discrimination by the board. (*Wygant, supra,* at 1847. *Wygant's* "strong basis in evidence" was held to be more than societal discrimination, and required a showing that there was prior discrimination by that governmental entity. The *Wygant* Court did not attempt to analyze this further, since it then found that the layoff provision at issue "was not a legally appropriate means of achieving . . . a *compelling* purpose." (*Wygant, supra,* at 1849, referring to the traditional strict scrutiny test) (Emphasis added)

It has been shown above that the evidence of discrimination was not sufficient to support the decree under Title VII. As such, it was certainly insufficient under the equal protection clause, even if, as attempted by the District Court, the constitutional standard is "lowered" to that of Title VII.

**B. The District Court Abused Its Discretion By Approving A Consent Decree Containing Provisions Inadequately Tailored to Achieving Its Goals.**

Even if a public employer's affirmative action plan is found "justified" by the evidence required under a Title VII and/or equal protection clause attack, it is still subject to attack on the grounds that the plan's provisions were not sufficiently "narrowly tailored" to the implementation of the government's goals (e.g. preventing employment discrimination). *Johnson, supra,* at 1452; *Wygant, supra,* at 274; *Sheet Metal Workers', supra,* at 3050 (1986); *Weber, supra,* at 208; *U.S. v. Paradise, supra,* 107 S.Ct. at 1067; *Higgins, supra,* 823 F.2d at 356-358.

Under either a Title VII or equal protection attack, this "tailoring" analysis (also articulated as whether an otherwise justifiable remedy is nonetheless too burdensome to innocent non-minorities) involves application of the same factors: (1) whether the plan requires "blind hiring" of minority applicants without regard to qualifications; (2) whether the plan requires rigid quotas or flexible goals; (3) whether the plan is temporary or designed to

maintain a permanently balanced work force; (4) the relationship between the numerical relief and the percentage of minorities in the relevant work force, (5) whether the plan unnecessarily trammels the rights of non-minorities or acts as an absolute bar to their advancement; and (6) whether the plan uproots the legitimate expectations of non-minorities. *See, e.g., Johnson, supra*, at 1454-56; *U.S. v. Paradise, supra*, at 1067; and *Higgins, supra*, at 357.

Applying these factors, the Court concluded that the decree's "[a]ffirmative race-conscious relief is the *only* effective means to assure the enjoyment of equal employment opportunity and to prevent further delays by the City." (CR 299:45) (Emphasis added)

This conclusion was wrong. As shown below, the decree's remedies were *not* sufficiently narrowly tailored to the eradication of emplyment discrimination in the SFFD.

*1. Blind Hiring* The District Court found that "promotions will not be blind. Race will be only one consideration among others, including each candidate's work history and performance evaluation." (CR 922:42) The Court also pointed to the provision in the decree stating that the decree did not require the promotion of "unqualified candidates" to show that hiring would not be blind. (CR 922:49)

The mandate of the decree for the appointment of 27 minorities to the position of fire lieutenant has no provision, however, by which that mandate can be suspended if there is an insufficient number of qualified minority applicants. (CR 695:16-17) In *U.S. v. Paradise, supra*, at 1070, the court found a one-for-one hiring requirement to be "flexible" in application because that requirement could be waived if no qualified black candidates were available. Further, that provision applied only when the department needed to make promotions and lasted only until the department came up with a procedure that did not have a discriminatory impact on Blacks.

Here, on the other hand, the decree required 27 positions in the rank of lieutenant to be filled from a list generated from the concededly invalid 1984 test. (CR 695:17) No minimum qualify-

ing score was ever established for any of the components of this test. Every person who "completed" the test was put onto the list. Some of the applicants who were to receive appointments were not even ranked in the top half of the 415 persons tested. This is clearly impermissible "blind hiring." *See Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), where a hiring goal was held unlawful because appointments were made on the basis of an invalid exam in the absence of nearly any other screening criteria such that the hiring decision was based almost entirely on a number.

It is well established that where an applicant has not been shown to be qualified for a position, affirmative action considera-tioins do not properly come into play. *Bratton v. City of Detroit*, 704 F.2d 978, 892 (6th Cir. 1983); *Williams v. New Orleans, supra. See Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986) which held that a decree was narrowly tailored because no qualified white was denied advancement and only *qualified* black candidates received promotions; *League of Martin v. City of Milwaukee*, 588 F.Supp. 1004 (E.D. Wis. 1984) (accelerated promotions of minorities were from among *qualified* applicants); *Local 93, supra*, 106 S.Ct at 3063 (consent decree was reasonable in that the plan did not require hiring of unqualified minority fire fighters.)

The decree's promotions of employees who have not demonstrated that they are qualified to be lieutenants in order to insure that racial "goals" are met is clearly "blind" and thus overbroad, and is not tailored to specific needs for qualified lieutenants.

*2. Rigid Quotas* The Court found that the "hiring goals and specific minority hiring requirements" set out in the decree were "highly flexible" (CR 922:49) and "meaningful." (CR 922:43) In order to reach this conclusion, the Court relied on the decree's own declaration that no provision shall be construed as a "quota." (CR 922:49) The Court also stated that "the requirement that the City justify a failure to meet a hiring goal does not make the goal a rigid quota." (CR 922:43) The Court also found that the "actual numbers of race-conscious appointments [were] modest" (CR 922:42) in light of the FEHC's assertion that if the numbers of minority appointments were reduced then the FEHC would

reconsider its decision to take no further action against the City. (CR 922:42)

The fact that the decree's goals were acceptable to the FEHC and not labelled as "quotas" does not exempt them from being actual quotas. The decree clearly established fixed quotas. It provided for manipulation of residency requirements, list durations, examination weights and seniority components. Paragraph 5 permitted a committee to override the Civil Service Provisions and the City Charter regarding seniority, educational credits, and other selection procedures. (CR 695:7-8) Paragraph 9(b) allowed the court to order additional steps where actions, although legal, proved inadequate to meet "goals." Consistent with a quota or ceiling, Paragraph 9(b) allowed the goal for femal hiring to be raised if it was discovered that there were additional qualified candidates. (CR 695:9-10) Paragraph 10 apparently intended to guarantee the appointment of a particular number of minority firefighters during the life of the decree in that it provided for the modification of the hiring goals if fewer than 500 hires occurred during its term. (CR 695:11)

The court also based its opinion that the goals were "flexible" on the provision in the decree that permitted adjustments to hiring goals if the hiring needs were altered by budget cuts and the like. (CR 922:50) But merely giving the City the option to change its quotas at a future date does not make the "goals" contained in the decree any less mandatory while they are effective.

*3. Duration* The Court found that a 7 year duration for the decree was "reasonable and necessary in view of the staggered testing schedule which is the heart of the decree." (CR 922:50) However, *Steelworkers v. Weber, supra,* and its progeny provide that voluntary affirmative action should be a "temporary measure . . . not intended to *maintain* a racial balance, but simply to eliminate a manifest racial imbalance." *Steelworkers v. Weber, supra,* 443 U.S. at 204 (Emphasis added). The decree's appointment of 33 minorities to the rank of lieutenant cures the racial imbalance in that rank. Therefore, maintenance of future goals for promotions to that rank for the 7 year duration of the decree is inappropriate under *Steelworkers v. Weber.*

Courts seem to be in general agreement that a consent decree should not last longer than 5 years. *See Martin v. Milwaukee, supra,*—5 year duration; *Local 93, supra,*—decree's life shortened from 9 to 4 years; *Black Grievance Comm. v. Phil. Elec. Co.*, 749 F.2d 1072 (3rd Cir. 1984)—5 year duration; *William v. New Orleans, supra,*—12 year duration improper as would span nearly entire career of many non-black officers. Thus the potential duration of the consent decree of up to 10 years is contrary to current authority. Moreover, such a duration is particularly unreasonable in light of the fact that the SFFD operated under the *WACO V* decree from 1977 until 1982, thus bringing the total number of years of judicial intervention and control to an unjustifiable 12-15 years.

*4. Numerical Relationship* The long term goals of the decree require the SFFD to hire women at the rate of 10% (half to be minorities) until women equal 10% of the sworn personnel, and to hire minorities at a rate of 55% until minorities represent 40% of sworn personnel. (CR 695:8-10)

The Court found that this numerical relief was "closely related to the relevant labor force," which it deemed to be the City and County of San Francisco. (CR 922:50) Once again the Court was influenced by the assertation that the FEHC would maintain its suit rather than accept the settlement provisions if the decree's numerical relief were any less. (CR 922:51)

In response to the Union's contention that the numerical hiring provision was not narrowly tailored enough because the particular minority firefighters to be promoted from the 1984 lieutenant exam were never harmed by that exam because it was deemed invalid and cancelled (CR 922:52) the Court held that the promotions from this list were *not* a remedy for "any harm caused by the 1984 test," and that the list was being used "only as a better than arbitrary means of generating a list of firefighters eligible for promotion." (CR 922:52-53) If the promotions from this list were not meant to remedy any harm caused by *that* invalid exam, then this remedy was not tailored to anything at all. The 1984 test was invalid, but the Court pointed to no other violation or discrimination for which use of the invalid exam was tailored, except to accelerate the promotion of lieutenants in the

SFFD at the expense of promoting potentially unqualified persons. The City expressed no urgent need for immediate promotions and, in fact, has expressed concern that too many lieutenants may have been promoted from the 1984 list. (CR 847:25) The City and the SFFD have maintained that they have operated effectively for years without permanent appointments. As many testified at the fairness hearing on 12/22/87, the interests of all would be better served by the careful development of a valid lawful selection procedure than by the accelerated race-conscious remedies of the decree, which mandate the appointment of individuals of questionable qualifications. Unlike the interim hiring pursuant to the court's 2/26/87 injunction, which was in response to a staffing crisis, these accelerated lieutenant promotions have not been shown to be necessary at all.

*5. Trammels Non-Minorities* The Court held that "the terms of the decree do not unnecessarily trammel the rights or uproot the legitimate expectations of non-minority or male employees and therefore do not impose an unacceptable burden." (CR 922:52) As evidence that no such trammeling resulted, the Court looked at the fact that the decree imposed no layoffs, nor did it impose an "absolute bar" to the advancement of white males. (CR 922:52)

In response to the Union's objection that the decree unnecessarily trammeled the rights of white employees in that it nowhere required the promotion of any white males along with others promoted, the Court stated that the City could not be required to promote any white males because there has been no showing of discrimination among that group. Certainly there is rarely a showing of discrimination against a group of white males, yet whether their legitimate rights are *unnecessarily* trammelled in an attempt to assist those who have been the victims of discrimination is a matter which the Court was required to take into account in determining whether the Consent Decree is properly tailored and not overbroad.

To the extent the decree required promotion of minorities only, it patently created an absolute bar to the advancement of whites. The provision that up to 36 whites and 12 additional minorities *may* be promoted does not cure this problem. In view of the facts

that: (a) there was no demonstrated or urgent need to make promotions before the new examinations were ready; and (b) there was no justifiable basis for making a total of 75 promotions (27 and 48) from a concededly invalid list with only 415 names and no established pass rate, the Court erred in approving the decree on the ground that there existed an inchoate possibility that as many as 36 whites could be appointed. As indicated above, unless individual victims of discriminatory practices can be identified, there in no authority permitting promotion of minorities in greater than a one-to-one ratio, which is the effect of this decree. *See U.S. v. Paradise, supra.*

*6. Uprooted Expectations* The Court did not discuss whether the decree uprooted any legitimate expectations of non-minorities. The Union, however, contends that it did. Non-minority firefighters as well as minority firefighters certainly have an expectation of growth within their careers in reward for good performance, and this means promotions when they are deserved. To promote quotas of minorities from invalid exams when no pressing need existed for such immediate promotions certainly uprooted the expectations of non-minority firefighters that they might be promoted on the basis of valid exams when a real need arose. Instead, these non-minorities were placed at the lowest promotional priority, a measure seen by them as "punitive." Certainly this type of treatment will not encourage them to continue to perform at their best, to take outside courses in order to qualify for promotions, and to compete legitimately within the department for the earned "reward" of promotions. Firefighter O'Shea, who had been with the SFFD for 13 years as of 12/22/87 and had taken the 1984 lieutenants' exam, testified at the fairness hearing that although there were only 1.4 points between him and the last non-minority firefighter promoted by the decree, there were 183.72 points between him and the last minority firefighter promoted by the decree. (CR 847:118) This discrepancy does not evidence a promotional scheme narrowly tailored to the needs of the SFFD, nor does it protect in any way the legitimate expectations of firefighters such as O'Shea.

The District Court clearly abused its discretion in finding the terms of the decree narrowly tailored to achievement of racial and gender-based balance within the SFFD.

### C. The District Court Abused Its Discretion By Approving A Consent Decree Which Was Not Shown To Be Fundamentally Fair, Adequate And Reasonable

Although settlement of a Title VII suit is naturally encouraged, a district court cannot summarily approve such a settlement. An independent decision must be made in each case concerning the fairness of every provision in the decree; thus courts have articulated procedures for approving consent decrees. *See U.S. v. Paradise, supra,* 107 S.Ct. at; *Williams v. Vukovich,* 664 F.2d 441 (6th Cir. 1983); *Moore v. City of San Jose,* 615 F.2d 1265, 1271 (9th Cir. 1980).

Where, as here, the decree affects third parties, the court must also carefully scrutinize the decree with respect to their rights and can approve the decree only if its effect on those parties is reasonable and not proscribed. *Williams v. Vukiovich, supra.* Determinations of reasonableness are generally made after a hearing has been held. *U.S. v. Paradise, supra,* 107 S.Ct. at 1053; *Kirkland v. Dept. of Correctional Svcs.,* 711 F.2d 1117 (2nd Cir. 1983); *EEOC v. Hiram Walker, supra; Williams v. New Orleans, surpra.*

A "fairness hearing" is a forum for all interested parties to comment on the proposed decree. The ultimate issue the court must decide at the conclusion of the hearing is whether the decree is "fair, adequate and reasonable." *See Officers for Justice, supra,* 688 F.2d at 625. The court has no occasion at the fairness hearing to determine the merits of the controversy or the factual underpinnings of the legal authorities advanced by the parties; it does have a mandatory duty to consider the adequacy of the settlement to the class; the fairness of the decree to those affected; and the public interest. *Williams v. Vukovich, supra,* and cases cited therein.

The bulk of the 113 objections filed with the Court in opposition to the Consent Decree went to the general issue of fairness. At the hearing Judge Patel categorically reviewed these objec-

tions, and then permitted counsel to address them. In addition, counsel were permitted to call upon individual interested and affected persons to testify concerning their opinions as to fairness of the decree. (CR 847:5-129) In light of the evidence in the record, and the objections and testimony presented on 12/22/87, it is clear that the court abused its discretion in finding the Consent Decree "fundamentally fair, adequate, and reasonable."

**1. The District Court Erred In Finding That The Decree's Lieutenant Promotional Provisions Were Fair And Reasonable**

**(a). The Immediate Promotion To Lieutenant Of Six Black Firefighters From The 1978 H-20 Eligibility List Was Not Fair And Reasonable**

Paragraph 11 of the decree provided that the SFFD "immediately appoint Robert Demmons, Audry Lee, Jimmie Braden, Worthy Brooks, Tyrone Rocket, and Bernie Wangara to the position of permanent fire lieutenant with a retroactive date of appointment of 3/9/79 . . ." (CR 695:11) In addition, the decree required the administration of a special captains' exam for the benefit of these 6 Black firefighters by 4/1/88. The pre-existing order freezing promotions from the captain's list was to be lifted as soon as the results of the make-up captains' test were integrated and correlated into the existing eligibility list. (CR 695:12)

The Court found that these provisions for the promotion of these 6 Black firefighters to lieutenant (and possibly captain) were fair in order to "remedy the adverse impact of the 1978 H-20 lieutenants' exam" (CR 922:41), despite the fact that the Court held in its 5/25/88 (ancillary) order that the decision of the Court of Appeal holding that the 1978 H-20 exam was invalid and discriminatory would have a preclusive effect on this litigation. (CR 916:2, referring to *CCSF v. FEHC*, 191 Cal.App.3d 976 (1987))

At the fairness hearing the objection was raised that the decree provided for the retroactive promotion of Black lieutenants from the invalid 1978 exam, but made no provision for any others (minorities or whites) also adversely affected by this same invalid exam. (CR 847:12)

The 1978 lieutenants' exam was found to be a valid exam for the purpose of testing job knowledge but not supervisory skills. The decree's immediate promotion of the 6 named Black firefighters did not provide for any testing or assurances of the supervisory skills required by lieutenants. Thus in its haste to remedy the lack of minority promotions during the period of this invalid 1978 exam, the decree focused on Blacks to the exclusion of other minorities, and provided for promotions without assuring that those promoted would be qualified.

**(b). The Immediate Lieutenant Promotions Based upon The 1984 Lieutenant Examination Were Not Fair And Reasonable**

Paragraph 16 of the decree provided that:

> Within 60 days of the execution of this Decree . . . the Department shall promote 11 Black firefighters (in addition to those appointed. . . [via Paragraph 11], 8 Hispanic firefighters, and 8 Asian and Filipino firefighters . . . to positions as fire lieutenants. These promotions shall be made from the lists generated as a result of the 1984 examination for the position of fire lieutenant, selecting those for promotion who scored highest on said examination. (CR 695:16-17)

Paragraph 16 of the decree also permitted the City to fill "up to 48 existing vacancies in the rank of fire lieutenant with persons who took the 1984 H-20 examination, choosing the persons who scored highest on that examination." (CR 695:17) The decree also required that minorities comprise 25% of these additional lieutenant promotions, with each minority group receiving its pro-rata share of such appointments. (CR 695:17) Thus if all 48 positions were to be filled, those appointed would include 5 Blacks, 5 Hispanics, and 2 Asians and Filipinos.

The court enthusiastically approved the promotions from the invalid 1984 lieutenant exam, stating tht this provision "will act to stem the shortage of lieutenants and to get qualified minority firefighters quickly into the upper ranks after 20 years of virtual exclusion. It will also be an opportunity for promotion for a

number of firefighters, many of whom will be white, who have long waited for promotions." (CR 922:41)

On 2/26/87 the District Court granted plaintiffs' and plaintiff-intervenors' motion for summary judgment on the issue of invalidity of the 1984 lieutenant exam. This test and its resulting eligiblity list were cancelled by the Civil Service Commission. *See U.S. v. CCSF*, 656 F.Supp 276 (N.D. Cal. 1987).

At the fairness hearing the Union objected to the decree's promotion of lieutenants from the invalid 1984 lieutenant exam as "unfair" for the following reasons:

*Deprives Qualified Candidates.* Because, as the Court admitted, those who "passed" the 1984 H-20 test were "not demonstrably more qualified to perform the job of fire lieutenant" than those who "failed" (CR 922:40), those who failed may have been quite qualified. To now make selections based upon the scores achieved on this exam is to obviously deprive potentially qualified candidates of a promotion.

*Promotes Potentially Unqualified Candidates.* The immediate promotion of lieutenants from the 1978 H-20 exam list or the 1984 H-20 list results in the promotion of firefighters who have not been proven qualified to act in the supervisory role of lieutenant. This may result in morale and resentment problems in the Department when firefighters have to serve under a lieutenant not proven qualified. (*See* CR 847:88, 109-110) The Court sidestepped this very real concern by stating that "the decree specifically provides that no one who is not qualified shall be hired or promoted according to its terms." (CR 922:40) The immediate lieutenant promotions from the 1978 and 1984 exams clearly contradict the decree's professed abhorrence of promoting unqualified persons. In fact, the Court itself recognized the reality of morale problems which can arise when appointments are made before qualifications are proven. In its 2/26/87 injunction, the District Court stated "[p]ermanent appointments may carry a stigma and pose morale and resentment problems . . ." (CR 426:30, citing *United States v. New Jersey*, Nos. 950-73, 77-254, 79-184, slip.op. at 4 (D.N.J. Oct. 14, 1986)) The Court would not "promote" the SFFD's provisional, interim firefighters

hired from an invalid eligibility list without first re-testing them. Yet this is in essence what the Consent Decree proposed to do in its lieutenant promotion provisions. Moreover, the decree directly contradicted the Court's 2/26/87 permanent injunction, which contained the provision that "Defendants shall not adopt any eligilibity list nor make any appointments in an acting, provisional or permanent basis to the ranks of . . . fire lieutenant (H-20) which are based in any way on selection procedures developed and administered pursuant to the 1984 job announcement for those ranks." (CR 426:33)

The Court stated that promotions from the 1984 lieutenant exam, admittedly *not* an accurate indicator of qualified candidates, were preferable to an "arbitrary" list. (922:42) There is no real difference, however, between scores non-reflective of any qualifications and an arbitrary list. Moreover, even a truly arbitrary list wouldn't selectively and unfairly deprive a certain group (those who scored low on the invalid test) from promotional opportunities.

The Consent Decree provided for the consideration by the City of "work history" and "performance evaluations," along with a candidate's race and score on the 1984 lieutenant exam, in determining promotions. Neither work history nor performance as a firefighter have been shown related to a candidate's ability to act in a supervisory role. (CR 922:42) It is ironic that the decree assigned to the City the task of evaluating a candidate's work experience and performance, when the City has itself never been shown to be qualified to perform this type of evaluation properly. Part of the reason the District Court approved the decree was that it found, in light of the City's past inability to develop and implement valid and non-discriminatory examinations and employee evaluation procedures, that the City required court supervision to perform these tasks in the future. (CR 922:38) Moreover, the Court specifically found no evidence of "good faith" by the City in its prior attempts to come up with valid employee selection procedures. (CR 922:46) Hence, the approval of a decree which "safeguards" against the promotion of unqualified persons by delegating to the City the task it has previously

been unable to perform of-assessing such qualifications on "job performance" was an abuse of discretion.

**2. The District Court Erred In Fnding That The Consent Decree's Provision Prohibiting Promotions Of Title VII Violators Was Adequate And Reasonable**

Paragraph 16 of the decree concluded by stating that "[n]o person found by the Court to have violated the Civil Rights Acts of 1866, 1871, or 1964, as amended in 1972, and the State and Local Fiscal Assistance Act while employed by the SFFD shall be promoted to lieutenant pursuant to the provisions of this paragraph [which based immediate promotions on the 1984 H-20 exam]. (CR 695:17)

The District Court found that this provision was "eminently fair" because it would be "patently unjust to allow those who had violated the civil rights laws to benefit from a decree that is intended to redress those violations." (CR 922:42)

No legal precedent supports such an ad-hoc judicially-imposed punitive measure. If an employee of the SFFD has committed a "civil rights" violation, complaints can be made and handled through the applicable legal channels, and subsequent punishment, if imposed, would be tailored to fit the nature and severity of the violation.

The Consent Decree provided no framework for determining what behavior would be prohibited, and punished all violations, whether they be outrageous or minimal, with the same penalty (i.e. deprivation of all future promotional opportunity). This provision is an unwarranted, and more than grossly unfair, interference with the City's internal promotional scheme and individual employees' legitimate employment interests.

**3. The District Court Erred In Finding That The Decree's Provisions Regarding Consideration Of Educational Credits Or Seniority In Determining Promotions Were Fair**

Paragraph 5 of the decree provided that "[i]n promotional examinations, the test development committee shall determine whether points shall be awarded on the basis of seniority and/or

education . . . [n]otwithstanding applicable provisions of the City Charter . . ." (CR 695:7)

The District Court found that educational credits "have not been shown to be job-related," and that to take seniority into account "would only serve to confirm rather than to remedy past discrimination." (CR 922:40) The Court failed to consider education that is job-related, and seniority earned by minorities.

**4. The District Court Erred In Finding That An Unrealistic Testing Schedule Was An Inconsequential Factor In Evaluating The Fairness Of The Consent Decree**

Paragraph 13 of the Consent Decree set forth a schedule of promotive examinations which were to begin 12/31/88 and end on 12/31/94 (at the end of the decree's 7-year term). (CR 695:13-15) The schedule was not randomly designed; its specific purpose was "to maximize the opportunity for advancement and promotion of all members of the SFFD, particularly minority persons and women." (CR 695:15)

In its Memorandum the District Court found that it "may already have proven too true" that the testing schedule was unrealistic. (CR 922:40) The Court then stated that this problem was "not grounds for invalidating the decree." (CR 922:40-41)

In determining overall fairness, the Court should look at each provision of the decree. *U.S. v. Paradise, supra; Moore v. San Jose, supra.* However, nowhere is it suggested that any one provision alone is dispositive on the issue of fairness. If the unreasonableness of a testing schedule is not in and of itself adequate grounds for disapproval of a settlement, it should at least be given some weight in determining overall fairness.

The decree stated its purpose for the schedule. If such purpose, apparently applauded by the court, is thwarted by an unrealistic schedule, then "unfairness" may result. The last scheduled test(s) may not occur at all during the life of the decree. If a court determines the decree is problematic, it should inform the parties of its precise concerns and give them an opportunity to reach a reasonable accommodation. *Williams v. Vukovich, supra.*

and cases cited therein. The Court erred in choosing to dismiss this admitted defect as inconsequential.

**5. The District Court Erred In Basing Its Finding That The Terms Of The Consent Decree Were "Fair" In Part Upon Unsubstantiated, Irrelevant Factors**

In addition to the reactions of the interested parties presented at the 12/22/87 fairness hearing, the District Court apparently also relied upon other "factors" never mentioned by the parties or interested persons in concluding that the terms of the Consent Decree were "fair, adequate, and reasonable." Factors mentioned by the Court included "the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; and the extent of discovery and stage of proceedings." (CR 922:29, citing—*Officers for Justice, supra,* at 625)

The court did not correlate any specific terms of the decree with its consideration of any of these additional factors. Instead, the court summarily concluded that (1) the plaintiff-intervenors' case was "strong;" (2) the risks for the City of continuing the litigation were "many;" (3) the City "revealed that its primary motive in negotiating and agreeing to the consent decree was to avoid the risk that the court would make a finding of intentional discrimination after trial;" (4) that a trial "on the harassment issues [would] have been long, complex and costly;" and (5) that the "general publication of the evidence at trial . . . would almost certainly have been extremely embarrassing and demoralizing to the SFFD." (CR 922:38-39)

The District Court did not explain why these "findings" rendered the decree's specific terms "fair." Furthermore, the Court didn't point to any specific or substantial factual evidence to support these conslusions. to support its statement that the plaintiff-intervenors' case was strong, the court referred to the fact that the City has been unable to produce validated hiring and promotional tests. However, the terms of the decree presume that valid tests are currently being developed, and the "plaintiff-intervenors' case" is thus limited to harassment claims, the strength of which was only alluded to through a "monitor's report" which dealt only with one incident, which was still under

litigation. (CR 922:20, 38) To support its conclusion that the risks to the City of continuing litigation were "many," the court made the unsupported assumption that merely because the City wanted to settle, the risks of litigation were "onerous," and evidence to be presented at trial would be "extremely embarrassing and demoralizing" to the SFFD. (CR 922:39) The court only hinted that such horrible evidence had been "previewed at various pretrial proceedings." (CR 922:27)

Neither the City, the SFFD, nor plaintiff-intervenors brought forth these factors in support of the decree at the fairness hearing on 12/22/87. These unsubstantiated "facts" may be relevant to the issue of the desirability of settlement versus litigation, but the District Court clearly abused its discretion in relying on them to support a finding that the terms of the Consent Decree were fair, adequate, and reasonable.

**D. The District Court Had Jurisdiction To Hear Local 798's Motion For Injunctive Relief Regarding The Seniority Assigned To Lieutenants Promoted Under The Consent Decree And Should Have Granted That Motion.**

Because the District Court prematurely foreclosed the submission of evidence on Local 798's motion for injunctive relief regarding the seniority to the 76 lieutenants who were promoted on 6/30/88, the evidence on that issue was submitted directly to this Court in connection with a motion for a stay order which Local 798 filed on October 5, 1988. That evidence established that the method by which these 76 employees were assigned seniority in the rank of lieutenant was as follows: three separate lotteries were held, one for the eleven (11) highest Black applicants on the eligibility list resulting from the 1984 promotional exam for that rank, a second combining the eight (8) highest Asian and eight (8) highest Hispanic lieutenants, and a third for the remaining forty-nine (49) applicants. The eleven Black applicants received the highest seniority in the rank of lieutenant, with seniority among those applicants determined on the basis of the lottery that was limited to those applicants. The sixteen Asian and Hispanic lieutenants were then assigned seniority below the Black applicants based on the results of the second lottery, which was limited to those applicants. Finally, the remaining forty-nine

applicants were assigned seniority below the pool of sixteen Asian and Hispanic applicants on the basis of the third lottery. No provision of the consent decree authorizes the assignment of seniority in a race-conscious manner to employees promoted in accordance with the terms of that decree. The assignment of seniority to these employees in a race-conscious manner was never presentd to the District Court at a "fairness hearing" to determine whether that action would unnecessarily trammel the interests of non-minority employees.

*Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 559, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) holds that where a consent decree manifests no intention to depart from an existing seniority system, such a departure cannot be made in the guise of implementation of that decree. *Dawson v. Pastrick,* 600 F.2d 70, 75 (7th Cir. 1979) holds that a union intervenor has standing to protect the seniority interests of its members in an action seeking affirmative relief for minority employees who have allegedly been the victims of discrimination in their employment. *Bushey v. N.Y. Civil Service Com.,* 733 F.2d 220 (2d Cir. 1984) holds that a public employer may not agree to grant race-conscious privileges as part of the resolution of employment discrimination litigation unless that matter has been submitted to the District Court for approval at a "fairness hearing." *Local Number 93, International Association of Firefighters, AFL-CIO v. City of Cleveland, supra,* ____ U.S. ____, 106 S.Ct. 3063 holds that a District Court's approval of a consent decree does not dispose of the valid claims of intervenors. Hence, Judge Patel was clearly in error in her conclusions that Local 798 had no standing to challenge the assignment of seniority in a race-conscious manner to employees promoted under the consent decree and that the City was free to assign seniority in that manner without prior judicial approval.

The City's contention that the District Court had no jurisdiction to hear Local 798's claim and that Local 798 must file an entirely new lawsuit over this matter in order to bring it before the court is also clearly in error. Under the doctrine of ancillary jurisdiction the federal courts have jurisdiction over all proceedings ancillary to the principal action, "regardless of the citizenship of the parties, the amount in controversy, or any other factor that

normally would determine subject matter jurisdiction." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3523. "The situations in which ancillary jurisdiction has been invoked include proceedings involving attorneys' fees, bankruptcy, settlement agreements, suits by receivers, and injuction, among others." *Id.* [T]he concept is a common-sense solution to the problems of piecemeal litigation that otherwise would arise by virtue of the limited jurisdiction of the federal courts prescribed in Article III and the complexity of many modern lawsuits." *Id.* Accordingly, since the manner of assignment of seniority to employees promoted to Lieutenant under the consent decree is a matter ancillary to the approval and supervision of that decree by the District Court, the District Court has jurisdiction to hear Local 798's objections on that issue.

## VI

## CONCLUSION

For the reasons set forth above Appellant Local 798 respectfully requests that this Court vacate and reverse the May 25, 1988 and June 10, 1988 orders of the United States District Court for the Northern District of California approving the Consent Decree in these consolidated actions and that this Court direct the District Court to take such actions as are necessary to place the parties in the positions they would be in if that decree had never been implemented. Local 798 further requests that this Court reverse the District Court's order permitting Defendant City to assign seniority to the 76 lieutenants who were promoted on 6/30/88 in a race-conscious manner.

## VII

## STATEMENT OF RELATED CASES

All of the following appeals arise out of this same case. Docket numbers 88-2735 and 88-2884 (appealed herein), along with 88-15015 (briefed separately), are appeals from the consent decree approved by the District Court on 6/10/88. Docket number 1905 is an appeal from a District Court order entered 2/5/88 enjoining discriminatory behavior on the part of the SFFD. Docket numbers 88-15473 and 88-15474 are appeals from an order of the District Court regarding the seniority assigned to employees appointed pursuant to that consent decree.

Dated: December 23, 1988

DAVIS, RENO & COURTNEY

By: DUANE W. RENO
Duane W. Reno
*Attorneys for*
*Defendant-In-Intervention*
*Local 798*

**ATTACHMENT A**

(By Federal Express)

Robert T. Moore
Richard Ugelow
Lisa Stark
Civil Rights Division
Employment Litigation Section
10th & Pennsylvania, N.W., #4718
Washington, D.C. 20530

Mary Dunlap
Dunlap & Thorkelson
1599 Dolores
San Francisco, CA 94110

Shauna I. Marshall
Equal Rights Advocates
1370 Mission, 4th Floor
San Francisco, CA 94105

Joann Swanson
Department of Justice
450 Golden Gate Avenue
San Francisco, CA 94105

Russell Galloway
786 Vicente Avenue
Berkeley, CA 94709

Denis Hayashi
Asian Law Caucus, Inc.
36 Waverly Place, Suite 2
San Francisco, CA 94018

William C. McNeill, III
The Employment Law Center
1663 Mission Street, Suite 400
San Francisco, CA 94103

Eva Jefferson Paterson
San Francisco Lawyers' Committee
for Urban Affairs
301 Mission, Suite 400
San Francisco, CA 94105

Denise Hulett
MALDEF
604 Mission Street, 10th Floor
San Francisco, CA 94105

Dan Siegel, Esq.
Chief of Complex Litigation
George Riley, Esq.
206 City Hall
San Francisco, CA 94102

## PROOF OF SERVICE BY MAIL

I declare that I am over the age of eighteen, not a party to the within action and that my business address is 90 New Montgomery Street, Suite 909, San Francisco, California 94105.

On December 23, 1988 I served the within BRIEF OF APPELLANT on the following party(s) by placing a true copy thereof in the U.S. Mail at San Francisco, California, fully posted and addressed as follows:

See Attachment A

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at San Francisco, California on this 23rd day of December 1988.

GRANIA B. DUFFY

Grania B. Duffy